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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

RODGER STROUP, Director, South Carolina Department of Archives and History; STATE OF SOUTH CAROLINA, ex rel Henry McMaster, Attorney General for the State of South Carolina ,

Petitioners,

v.

THOMAS LAW WILLCOX, JOHN M. WILLCOX and KATHRYN WILLCOX PATTERSON

Respondents

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case presents questions regarding the ownership of the government documents of two South Carolina Governors during the 1860's. This suit originated in Bankruptcy Court, which ruled that the State of South Carolina owned the documents and that the motion of the State and the Director of the Department of Archives for certification of State law questions to the South Carolina Supreme Court was moot. On appeal by the Plaintiff Willcox, the District Court reversed the Bankruptcy Court decision without certifying State law issues and ruled that the Documents were Willcox's property. The Court of Appeals affirmed the District Court opinion.

1. Whether the decision of the Court of Appeals as to State law issues conflicts with *Erie RR. v. Tompkins*, 304 U.S. 64 (1938)?

2. Whether the Court of Appeals has made a determination of South Carolina State law that is plainly wrong in conflict with precedent of the United States Supreme Court?

3. Whether the Court of Appeals has decided a Federal question, certification of State law questions to the State Supreme Court, in a way that conflicts with decisions of the Supreme Court and other Courts of Appeals regarding certification including principles of federalism?

4. Whether the Statute of Limitations or Staleness bar the State's claims to the Documents in question?

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CITATION OF OPINIONS AND ORDERS ENTERED

The Opinion of the Court of Appeals of October 27, 2006 is reported at 467 F. 3d 409 (4th Cir. 2006). Appendix (App.) , *infra* a4. The Judgment of that Court of October 27, 2006 is unreported. The denial of rehearing by that Court on November 28, 2006 (App. a2) is unreported. The Opinion of the District Court of January 12, 2006 (App. a21) is unreported. The Opinion of the Bankruptcy Court (App. a41) is reported at 329 B.R. 554 (Bkrtcy D. S.C., 2005).

JURISDICTION

The Court of Appeal's Judgment and Opinion were entered October 27, 2006. The Court entered an Order denying the State and Stroup's Petition for Rehearing and Rehearing En Banc on November 28, 2006. This Court has jurisdiction to review on a writ of certiorari the judgment and opinion in question pursuant to 28 U.S.C. §1254.

STATUTES INVOLVED

The following statutes are set forth in the Appendix, a86 - a89.

Act No. 405, 1719, Vol 3, Statutes at Large (Cooper, 1838) (App. a86)

Act No. 1448 of 1789, Vol. 5, Statutes at Large (Cooper, 1839), p. 102 (App. a 87)

Act No. 4754 , 1865 S.C. Acts 340 (App. a87)

S.C. Code Ann. §§30-1-10, 30-1-20, 30-1-40, 30-1-70 (1991) (App. a87- a89)

S.C. Code Ann. §30-4-20(c)(Supp. 2005) (App. 89)

STATEMENT OF THE CASE

Procedural Background

This matter initially arose in the United States Bankruptcy Court in South Carolina. Respondent Thomas Willcox (Willcox[1]) filed an Adversary Proceeding to Determine title to property which consisted of over 400 documents dating from the 1860's (Documents). Joint Appendix (J.A.) p. 26. Applicants State of South Carolina and Rodger Stroup, Director of the South Carolina Department of Archives and History, (collectively, State) filed an Answer dated November 10, 2004 asserting that the State owned the documents. J.A. p. 32. Respondents John Willcox and Kathryn W. Patterson, respectively, the cousin and sister of Respondent Willcox, filed an Answer and Counterclaim as to Willcox (J.A. p. 136) to which he responded (J.A. p. 147).

The trial was held on June 6 and 7, 2005 in the Bankruptcy Court in Charleston, South Carolina. On August 5, 2006, the Bankruptcy Court ruled that the Documents in question are not the property of the debtor's estate and that the State had proved superior title. *In re Willcox*, 329 B.R. 554 App. a41. Willcox appealed the decision to the United States District Court for the District of South Carolina. On January 12, 2006, the District Court reversed the Bankruptcy Court and ruled that the Documents are the property of Willcox and that the State's claims are barred by the statute of limitations and laches. (App. a21). The State and Stroup appealed the decision to the Court of Appeals. The District Court issued a stay of its January 12, 2006, Order on March 13, 2006. J.A. p. 6.

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[1]All references herein to Willcox alone refer only to the Respondent Thomas L. Willcox unless otherwise noted.

The Panel of the Fourth Circuit in this case found that the "State had failed to establish that South Carolina law at the relevant time treated gubernatorial papers as public property." 467 F.3d at 417 (App. 19). The Court found that this conclusion left the State with no basis to rebut the presumption of possession in Respondent Willcox as to documents at issue of two 1860's Governors (Documents) and no basis to claim title superior to him. As noted, the Court of Appeals denied the Petition for Rehearing and Rehearing En Banc and denied the Motion to Stay the Mandate. The Petitioners seek the review by this Court of the Opinion and Judgment of the Court of October 27, 2007, and the Court's denial of rehearing.

By an Opinion in Chambers dated December 18, 2006, the Chief Justice denied the Application for Stay of the State and Dr. Stroup. 549 U.S. ___.

Jurisdiction in Court of First Instance

Willcox alleged that the Bankruptcy Court had jurisdiction of this proceeding pursuant to Chapter 11 of the United States Bankruptcy Code, 28 U.S.C. §2201, et seq. regarding Declaratory Judgments and 11 U.S.C. §541 and 28 U.S.C. §§157 and 1409 and Federal Rules of Bankruptcy Procedure Rule 7008 regarding core proceedings. Jurisdiction also existed under 28 U.S.C. §1334(b).

Statement of Facts

The Documents in question consist of approximately 444 documents created by or received by Governors Francis Pickens and Milledge Bonham in their official capacities as governors during their administrations lasting from December, 1860 to December, 1864. J.A. p. 192 (Joint Pretrial Order, ¶ a.24); p. 374, ll. 12 -25; p. 494, ll. 9 - 24. The Documents

address civil and military functions of State government.[2] All of these subjects are governmental functions for the State of South Carolina. *Id.*

The Documents in question are similar in nature and docketing to other Documents housed at the Department of Archives from the Pickens and Bonham administrations. and other Governors.[3] The characteristics of the Documents, including docketing on them, show that they were kept and maintained by the Governors' offices. J.A. p. 494, ll. 9 - 12. State Department of Archives experts testified that the Documents were ones that should be placed with that agency.

Willcox found the Documents in question in what appeared to be a department store bag in 1999 - 2000 in an otherwise empty closet in his stepmother's house after almost everything else in the house had been cleared out. J.A. p. 193 (Joint Pre Trial Order ¶ 36); J.A. p. 271, ll. 13 - 16. His auction of the Documents did not go forward after a State court issued a temporary restraining order as to the sale of the Documents. J.A. p. 874.

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[2]Joint Appendix in Court of Appeals. (J.A.) pp. 190 - 192 (Joint Pre Trial Order, ¶¶ a.4, a.5 and a.22); J.A. p. 381, ll. 7-15; p. 382, l. 5 - p. 384, l. 15; p. 407, l. 22 - p. 408, l. 22; p. 488, l. 9 - p. 494, l. 8; *see eg.* J.A. pp. 720 & 722, Items 2, 3, 4, 5, 6, 7, 8, & 58 and J.A. pp. 1014 - 1065 (sample Documents).

[3]J.A. p. 384, l. 11 - p. 388, l. 19; p. 392, l. 4 - p. 393, l. 12; p. 419, l. 21 - p. 420, l. 18; p. 489, l. 19 - p. 491, l. 7; p. 495, l. 5 - p. 496, l. 6.; p. 499, ll. 2 - 24;. pp. 900 - 918; *see, eg,* J.A. p. 1042.

Exactly how the Documents left State custody and how Mr. Willcox's ancestors obtained them is not known. *See*, Bankruptcy Court Order, 329 B.R. at 560 (App. a44). Shortly after Governor Bonham left Office, General Sherman's march through South Carolina was anticipated, and Governor A.G. Magrath ordered the State Auditor, James Tupper, to prepare the State's records for removal from Columbia if necessary. J.A.. p. 192 (Joint Pre Trial Order ¶¶ a.25 and a27); p 394, l. 13 - p. 395, l. 3.; and pp. 922 and 925.

On February 15, 1865, shortly before General Sherman's capture of Columbia, Governor Magrath declared martial law in the city and appointed Plaintiff's ancestor General Evander Law Provost Marshall for Columbia for approximately two days.[4] No evidence exists that Governor Magrath gave the records to General Law or that he was authorized to retain State records.

A large number of State archives and records were moved out of Columbia on February 16, 1865.[5] Although no Documents specifically stated that those records included the records of Governors Pickens and Bonham, the records did include the State archives, including the Executive Department and State Departments. J.A. pp. 961, 971, 976, 979, 994, 996 and 1007.

The Bankruptcy Court found that post war efforts to recover records ". . . does tend to evince that executive Documents were removed and were intended to be returned."

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[4]J.A. p. 192 (Joint Pre Trial Order, ¶a. 26); J.A., p. 395, ll. 7 - 21; J.A. p. 928.

[5]J.A. p. 192 (Joint Pre Trial Order, ¶ a.26); J.A., p. 396, l. 6 - p. 397, l. 16 and pp. 935, 949, 961, 971 and 976; 329 B.R. at 560; A. p. .

J.A. p. 1092, n. 16 (329 B.R. at 567, n. 16). Although in 1866, the records of the Governor's Office had not been turned over to the Governor despite efforts to recover them, substantial quantities of the State Archives were returned to Columbia . J.A. p. 403, l. 24 - p. 405, l. 3 and pp. 996 and 997 (pp. 4 & 6); p. 1010.

The first reference that indicates that General Law may have been in possession of the Documents is an 1896 letter he wrote to an individual in New York. J.A.. p. 193 (Joint Pre Trial Order, ¶ a.34); J.A. p. 447, ll. 3 - 5 p. 746. The only reference to the Documents, after 1896, is in correspondence dating from 1939 and during the 1940's between General Law's granddaughter, Annie Storm, and the University of North Carolina and Mr. R.L. Meriwether of the South Caroliniana Society. *See* J.A. pp. 774 & 785. The correspondence demonstrates that General Law had no authority to retain the Documents because it refers to them, without specificity as "original South Carolina State House papers" "entrusted" to General Law for "safe keeping" and states that they should be returned to South Carolina from Mrs. Storm's Florida home. J.A. pp. 764, 767, 770, 771, 784 and 785. Willcox introduced no evidence as to how the Documents in question got from General Law to Annie Storm or how the Documents got from Mrs. Storm to Willcox's stepmother's closet over fifty years later.

Since colonial times, the State has made an effort to protect its records. In the 1700's, records were housed in a building in Charleston. J.A. p. 541, l. 19 - p. 542, l. 11. One of the primary reasons for the construction of the new State House in the nineteenth century was to provide a place for the storage of public records. *Id.*

Although the Department of Archives only has the records of one antebellum Governor since the Declaration of

Independence, this circumstance may be explained in part because the powers of the Governor increased significantly with the military effort during the Civil War. J.A. p. 532, l. 17 - p. 534, l. 3; p. 535, l. 8 - p. 536, l. 1. Archives has the "great bulk" of known papers of South Carolina Governors. J.A. p. 499, ll. 4 - 7. With some exceptions, Archives does have records of every South Carolina Governor since 1860.[6]

The Bankruptcy Court specifically found that "Plaintiff did not present convincing evidence to support its conclusion that Governor's records involving public functions are considered private, and that they are generally kept by each Governor to do with what they wish." 329 B.R. at 572 (App. a69). The Court found that the State had met its burden of proving title to the Documents. *Id.*

REASONS WHY CERTIORARI SHOULD BE GRANTED

SUMMARY OF ARGUMENT

The Court of Appeals' determination of State law issues in this case violates *Erie RR. v. Tompkins*, 304 U.S. 64 (1938), is plainly wrong about State law *(Leavitt v. United States*, 518

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[6] The exceptions are for records of Governors Perry, Thurmond and McNair and portions of the records of Governors Pickens, Bonham, Magrath and Hollings which are in government or institutional settings, and those at the Caroliniana Library are primarily personal papers. *Id.* and . J.A. p.. p. 377, l. 23 - p. 378, l.19; 439, ll. 13 - 15; p. 455, l. 9 - p. 456, l. 16; p. 510, ll. 5 - 17; p. 543, ll. 11 - 16. The South Carolina Historical Society has some letter books of Governor Magrath. J.A. p. 536, ll. 13 - 18.

U.S. 137, 144 (1996)) and is in conflict with the authority of the United States Supreme Court and other Courts of Appeals regarding the certification of State law issues to State Supreme Courts. The Court of Appeals erroneously decided State law issues even though the Court found insufficient guidance in South Carolina state law for this case and noted that the case "poses questions which [the Court is] ill equipped to answer" (467 F. 3d at 413 (App. 11).

In violation of *Erie*, the Court of Appeals imposed a federal common law on State law issues in this case. This error came from the Court's reliance on policy arguments, Federal precedent and an excessively narrow reading of State precedent that failed to give effect to State law.

Moreover, a wealth of State authority clearly supports the decisions of the Bankruptcy Court and the position of the State's Department of Archives and its chief legal officer, the Attorney General of South Carolina that the State owns the Documents in question. The Court of Appeals excessively narrow reading of State law is "plainly wrong" and amounts to a "blatant federal-court nullification of state law" in conflict with *Leavitt, supra*.

The Court of Appeals could have avoided the Erie violations and its plainly wrong determination of State law if it had certified the State law issues to the State Supreme Court. The Court of Appeals' failure to certify is in conflict with decisions of the United States Supreme Court and other Courts of Appeals and disregards principles of federalism inherent in certification.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS VIOLATES ERIE RR v. TOMPKINS

This case raised no federal question regarding ownership of the Documents but is one solely involving state law. Yet the Court of Appeals wrongly ignored South Carolina decisions choosing instead to look to its own view of general common law. In so doing, the Fourth Circuit failed to heed this Court's requirements first enunciated in *Erie RR v. Tompkins*, *supra*[7], that (quoting Justice Holmes), as follows, federal courts have no power:

> . . . to use their judgment as to what the rules of common law are ..." because "... (t)he common law so far as it is enforced in a State, ... is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in

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[7] Although not expressly raised in the Court of Appeals, the *Erie* issues are part and parcel of the arguments concerning applicable State law and failing to certify. Moreover, *Erie* issues are jurisdictional and can be raised at any time. "*Erie* denied the federal government the power to create substantive law solely by virtue of the Article III power to control federal court jurisdiction." *Southland Corp. v. Keating*, 465 U.S. 1, 21 (1984). "Lack of subject matter jurisdiction may be raised at any time because the parties cannot, by their consent, confer jurisdiction upon a federal court in excess of that provided by Article III of the United States Constitution." *Hill v. Blind Industries and Services of Maryland*, 179 F.3d 754, (9th Cir. ,1999); opinion amended on reh, 201 F.3d 1186 (2000). *See also*, 87 Harvard L. Rev. 889, 895 (1974).

> England or anywhere else. ... The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.

Erie, 304 U.S. at 79. When other federal courts have so ignored this plain mandate of *Erie* as the Fourth Circuit did here, this Court has summarily reversed. We ask that it do so again.

Erie held that there "is no federal general common law" and that federal courts have no power to declare the "substantive rules of common law applicable in a state ...." 304 U.S. at 78, 58 S.Ct. at 823. As one scholar has written, "[s]trict adherence to the principles of judicial federalism recognized in *Erie* is necessary to ensure that the political safeguards of federalism serve their intended function." Clark, "Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie," *145 U.Pa.L.Rev.* 1459, 1489 (June, 1997). As stated in *Newfound/ Owanatanna,, Inc. v. Town of Harrison, Maine*, 520 U.S. 564, 615 (1997), "...where state law already operates within a particular field, [the Court has] applied state law rather than opting to create federal common law." Here, quite simply, the Court of Appeals ignored *Erie's* command.

Erie has been recognized as being applicable to state law issues in Bankruptcy cases. *See, Citron Inv. Corp. v. Emrich*, 493 F.2d 561 (9th Cir. 1974); *In re Byrd*, 294 B.R. 808 (Bkrptcy M.D.Ga. 2003); Hill, The "Erie Doctrine in Bankruptcy," 66 Harv. L. Rev. 1013 (1953), cited in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.* 483 U.S. 143, 157 1(987), Scalia, J. concurring in judgment. The State law issues in the instant case do not relate to bankruptcy objectives. The Courts and Congress " . . . must respect the principles of federalism and the limits of Congressional power expressed in

the primary *Erie* doctrine." *see* Plank, "*The Erie Doctrine and Bankruptcy*," 79 Notre Dame L. Rev. 633 , 691 (2004). The Court of Appeals failed to do so in the instant case.

In numerous instances over the years, this Court has granted *certiorari* and reversed or vacated the ruling of the Court of Appeals for failure to follow the strict requirements of *Erie*.The Court found in these instances that application by the lower federal courts of the "general law" rather than the law of the particular State involved warranted reversal. [8]

The Court of Appeals failed to give effect to South Carolina case law in violation of *Erie* by reading significant State cases regarding the public nature of government documents so narrowly as to deprive them of their meaning. *Pinckney v. Henegan*, 2 Strob. 250, 1848 Wl. 2877, 2 (S.C. App. Law 1848) and *State v. Farnum*, 73 S.C. 165, 53 S.E. 83,85 (1905). *See infra*. The *Erie* violation is evident, too, in the Court's making its own policy conclusion about the utility

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[8] *See*, e.g. *Rosenthal v. N.Y. Life Ins. Co.*, 304 U.S. 263, 264 (1938) ["It is enough to say that the questions to be decided are those of state law and should have been determined according to the decisions of the state court." (citing *Erie*)].; *West v. American Telephone and Telegraph Co.*, 311 U.S. 223, 236 (1940); *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 178 (1941) ["The federal court was not at liberty to undertake the determination of that question (construction of statute) on its own reasoning independent of the construction and effect which the State itself accorded to its statute."]; *Hudson v. Moonier*, 304 U.S. 397, 58 S.Ct. 954, 82 L.Ed. 1422 (1938) [decision of Court of Appeals reversed as court treated issue as one of "general law" rather than applying law of Missouri]; *Gasperini v. Center for Humanities*, 518 U.S. 415 (1996) [Court vacated and remanded consistent with New York's law controlling compensation awards]; *Bernhardt v. Polygraphic Company of America*, 350 U.S. 198, 200, 205 (1956); *New York Life Ins. v. Jackson*, 304 U.S. 261, 262 (1938).

of applying a presumption of title from possession while drawing support from law review articles and federal cases (467 F. 3d at 413 - 414 (A. pp.a10 - a13). The Court also relied on a federal case and statutes to draw legal conclusions from evidence that some records of some South Carolina governors were in locations other than the South Carolina Department of Archives. 467 F. 3d at 417 (App. a18 - a19). The Court committed these *Erie* violations despite the Bankruptcy Court's ruling that " it appears that the [South Carolina] Supreme Court has directly addressed the public nature of a government document and determined the title and ownership of public records." *In re Willcox*, 329 B.R. at 569 (App. a64).

As this Court stated in *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 497 (1941), *Erie* commands that a federal court "must determine what the state law is, not what it ought to be." *Erie's* "object and effect were to bring federal judicial power under subjection of state authority in matters essentially of local interest and state control." *U.S. v. Standard Oil Co. of California*, 332 U.S. 301, 307 (1947). There can be no interest more compelling for application of State law as the state courts have interpreted it, than control over and title to State records.

Moreover, the Court has not hesitated to ensure compliance with *Erie* by abstaining or certifying the case to the state courts where it deems state law is difficult or unsettled. *See, Louisiana Power and Light Co. v. City of Thibodaux*, 360 U.S. 25 (1958); *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593 (1968); *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800 (1976). In *Kaiser*, this Court held that "[t]he Court of Appeals erred in refusing to stay its hand [as] [t]he state law issue which is crucial in this case is a truly novel one ... to be resolved by the New Mexico courts ...." *Thibodeaux* – the "case most commonly associated with Erie-based abstention," *Clark, supra* at 1591 – concluded that abstention was necessary because the state court is "the only tribunal

empowered to speak definitively" on questions of state law. 360 U.S. at 29. In *Colorado River*, abstention was "appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case ... at bar." 424 U.S. at 814, 96 S.Ct. at 1244.

As a leading scholar has argued, certification is the one mechanism which will best insure that the *Erie* command is met if the federal court is uncertain as to what state law is in a given instance. Thus, in order to insure compliance with *Erie*, "federal courts should employ a presumption in favor of certifying unsettled questions of state law to state courts whenever state law authorizes this procedure." *Clark, supra* at 1564. Otherwise, "federal courts risk encroaching on the constitutional prerogatives of the states if they proceed to exercise the substantial policymaking discretion necessary to fashion substantive rules of common law to govern matters within the legislative competence of the states." *Id*; *see also*, *Sincox v. Blackwell*, 672 F. 2d 423, 424 (5th Cir. 1982).[9]

As stated in *Mosher v. Speedstar Div. of AMCA Intern., Inc.*, 52 F.3d 913, 916 (11th Cir. 1995).

> Where there is any doubt as to the application of state law, a federal court should certify the question to the state supreme court to avoid making unnecessary *Erie* [footnote omitted] "guesses" and to offer the state court the

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[9] In, *Sincox*, the Fifth Circuit also relied on *Erie* as a motivator when it decided to certify a question to the Louisiana Supreme Court because that Court was "[c]onscious of the commands of *Erie* . . . that we are to apply state law in this diversity case, and fully cognizant of the importance of this legal issue to clients and to the legal profession of Louisiana . . . ."

> opportunity to interpret or change existing law. [citations omitted]. . . .As one member of our court noted in a recent dissent:. . . [Certification] is a useful adjudication tool. . . Only a state supreme court can provide what we can be assured are "correct" answers to state law questions, because a state's highest court is the one true and final arbiter of state law. From our perspective, state law is what the state supreme court says it is, and a state supreme court's pronouncements are binding on every state and federal judge. *Sultenfuss v. Snow*, 35 F. 3d 149, 1504 (11th. Cir 1994) (en banc) Carnes, J.,dissenting. (emphasis added).

In the instant case, the Court of Appeals made a decision about South Carolina law that was plainly not "correct, " and its failure to certify is in conflict with the decision of the Eleventh Circuit in *Mosher*. Although failing to certify State law issues in this case is an error that exists independently of the *Erie* violation (*see* Argument III, *infra*), the Court could have avoided these *Erie* problems, had it certified the State law issues in this case.

Despite this wealth of authority pointing in a different direction, the Court of Appeals chose to analyze this case in terms of the"general law" regarding possession of property rather than recognizing that South Carolina applies a far different law where government records are concerned. Here, the current legislative policy of South Carolina governing public records is clear. *See, Am. Heart Assn. v. County of Grvlle*, 331 S.C. 498, 489 S.E.2d 921 (1997) [original will of "Shoeless Joe" Jackson is "public record" under state law and belongs to Probate Court]; *Op. S.C. Atty. Gen.*, 1997 WL 208029 (March 25, 1997) ["Section 30-1-10 *et seq.* (Public Records Act) governs the sanctity and security of public records

... in South Carolina." (App. a87) *see also* §30-4-20(c)(Supp. 2005), App. a89] This policy is a codification of the longstanding common law rule in South Carolina that the records of the government belong to the government. *State v. Farnum, supra.* Yet, in effect, the Court of Appeals fashioned its own rule based upon general law and unduly limited South Carolina cases going back to the *Pinckney* decision in 1848 and statutes dating to even earlier times. *See, infra.* As this Court has done in numerous such instances previously, the Court should grant *certiorari* to insure that state law is followed, consistent with *Erie.*

The Court made these applications of federal precedent and made wrong decisions about South Carolina law contrary to the ruling of the Bankruptcy Court in this case and the positions of the State's Attorney General and the Director of the South Carolina Department of Archives. The Court took that approach even though the Court acknowledged that this case ". . .poses questions which [the Court was] ill equipped to answer." 467 F. 3d at 413 (App. a11). Accordingly, the Court " . . . failed to give effect to the substantive law of the state . . . ." in violation of *Erie. Kelley Drye and Warren v. Murray Industries, Inc.,* 623 F. Supp 523, 526 (D.C. N.J. 1985).[10]

"*Erie* . . . was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts." *Guaranty Trust v. York*, 326 U.S. 99, 109 (1945) In its plainly wrong decision and failure to certify, the Court of Appeals has failed to give effect to South Carolina law and violated *Erie* in a case that is of utmost importance to the State of South Carolina

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[10] *Kelley* was a diversity case, but the same rule would apply in the instant matter.

II. THE COURT OF APPEALS DETERMINATION OF SOUTH CAROLINA STATE LAW ISSUES IS PLAINLY WRONG

This case should be reviewed pursuant to the authority of *Leavitt v. United States*, *supra*, 518 U.S. at 144, because the Court of Appeals for the Fourth Circuit has made a decision about South Carolina law that is plainly wrong. In *Leavitt*, the Court summarily reversed a Court of Appeals decision on a state law severability issue and made the following ruling that is directly applicable here:

> we do not normally grant petitions for certiorari solely to review what purports to be an application of state law; but we have done so, *see Steele v. General Mills, Inc.*, 329 U.S. 433, 438, 440-441, (1947); *Wichita Royalty Co. v. City Nat. Bank of Wichita Falls,* 306 U.S. 103, 107 (1939) and undoubtedly should do so where the alternative is allowing blatant federal-court nullification of state law. The dissent argues that [t]he doctrine of judicial restraint weighs against review, *post*, at 2073, but it is an odd notion of judicial restraint that would compel us to cast a blind eye on overreaching by lower federal courts. The fact observed by the dissent, that the "underlying substantive issue in this case" is a controversial one, generating "a kind of 'hydraulic pressure' that motivates ad hoc decisionmaking," *ibid.*, provides a greater, not a lesser, justification for reversing state-law determinations that seem plainly wrong. In our view, these considerations combine to make this an "extraordinary cas[e]" worth our effort of

summary review, *post,* at 2074.

Id. The instant case presents just such a case of federal-court nullification of state law by a "plainly wrong" state-law determination. This Court should grant this Petition and reverse the decision of the Court of Appeals for this reason.

The totality of the South Carolina case law, statutory authority and the facts in this case overwhelmingly demonstrate that the Documents are public property of the State of South Carolina. The Court of Appeals, in effect, placed an unnecessary and impossible burden on the State - a case, statute or document that would define with microscopic precision that Governors' Office records of the time in question were public records and that those public records are public property. No such statute, case or statute exists and none is necessary. The statutes and cases clearly demonstrate that South Carolina has consistently treated all of its government records as public property. The Panel read South Carolina law inappropriately narrowly with the result that it reached a plainly wrong decision about South Carolina law. This erroneous construction of South Carolina law is particularly troubling when the Court of Appeals could have instead certified the case to the South Carolina Supreme Court.

A. Fact Findings

The Bankruptcy Court made fact findings related to the nature of the Documents as Public Records which may not be reversed absent a finding that they were in clear error. [11]: *In re Bogdan*, 414 F. 3d 507, 510 (4th Cir. 2005); *Willcox*, 467 F. 3d

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[11] Although these findings were in the Bankruptcy Court's Conclusions of Law section, the Court stated that any Conclusions that constitute Findings of Fact are so adopted. 329 B.R. at 559, n. 2 (App. a42).

at 412 (App. a8). The Court of Appeals made no finding of clear error, yet the Court of Appeals' reached conclusions that were in direct conflict with the Bankruptcy Court's fact findings.

Although the Court of Appeals stated that "[t]he content of the papers and the conditions of their production are not in dispute" (467 F. 3d at 415, n. 2)(App. a14), the Court found that "governor's records have both public and private aspects" (*Id.*) This public /private statement does not cite any legal authority for support and conflicts with the Bankruptcy Court's findings that they are public records.[12] Also in conflict with the Bankruptcy public records findings is the Court of Appeal's ruling that ". . . the State has provided no evidence that, prior to the passage of this Act, the papers at issue would have belonged to that category" of Executive Chambers papers. 467 F. 3d at 416 (App. a17).

Another conflict with that Bankruptcy finding was the Court of Appeals finding that that donations of papers of some Governors to places such as Clemson University and the University of South Carolina suggest that "even twentieth century South Carolina governors have exercised a right of transfer over their papers, a right at the core of the bundle of

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[12] "The fact that many of the official duties of the Governor, a public official, are specifically addressed by the referenced Documents, lends strong support to the State's position that the Documents are public records. [footnote omitted]." 329 B.R. 567 (App. a59).The " . . . docketing system [for the Documents] appears to indicate an intent to preserve the document as relating to the public office." 329 B.R. at 568 (App. a61)."In sum, the Documents as a whole appear to relate to the official duties of the public office of the Governor and for the reasons stated herein appear to be public records." 329 B.R. at 568 (App. a62).

rights known as ownership." 467 F. 3d at 417 (App. a18).[13] The Bankruptcy Court found no private aspects to the Documents.[14]

B. Cases

The Court of Appeals failed to apply a definitive holding in *State v. Farnum*, 73 S.C. 165, 53 S.E. 83,85 (1905). 467 F. 2d at 415. (App. a15). *Farnum* held as follows:

> It is the plain and obvious public duty of any officer to keep books, letters, and other documents relating to the business of his office

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[13] Documents of some former Governors are at places such as the Library of Congress, a Historical Society, Clemson and the Caroliniana Library. A large number of the Governor's documents at Duke and Caroliniana are more political or personal in nature. J.A. p. 381, ll. 7-19. The Department of Archives still has records of every Governor since 1860 with certain exceptions. 329 B.R. at 572 (App. a69). Moreover, the documents at these other locations are under secure conditions and accessible to the public in contrast to private ownership which could be anywhere in the world and might not be accessible to the public.

Further, the Court of appeals concern over the possibility that the future claims might be made for documents in other locations is speculative, irrelevant and misplaced. Nothing in the Record shows any inclination of the State to pursue records at the public locations.

[14] The Bankruptcy Court found that ". . .[I]t appears that the State has been active in preservation of its records. . . . Plaintiff did not present convincing evidence to support its conclusion that Governor's records involving public functions are considered private and that they are generally kept by each Governor to do with what they wish. [footnote omitted]. 329 B.R. at 572 (App. a69).

> and to the manner in which he has discharged or failed to discharge its duties in the place where the public business with which he is charged is conducted . . . All such papers are public documents, subject to the examination of the committee, for the reason that they relate either to the rightful discharge of the duties of the office of the defendant or to his violation of the official trust reposed by the state in him, by dealing with liquors in a manner forbidden by law. (emphasis added).

Therefore, a document is a public document and public property if it relates to the business of "any" public officer's office. *Farnum*. All of the documents at issue meet this test (J.A. pp. 100 - 120 and 1013 - 1065), and the Bankruptcy Court specifically found that ". . . the Supreme Court's definition of a public record in *Farnum* is consistent with the nature of the Documents herein. . . ." 329 B.R. 554, 567 (Bkrtcy D.S.C. 2005)(App. a60). *Farnum* is directly contrary to the Court of Appeals holding that the fact "[t]hat the papers were produced in an official context is simply insufficient to demonstrate title." 467 F. 3d at 415, n. 2. (App. a14)

Instead of applying the above clear statement of the law, the Court of Appeals swept up *Farnum* in a list of post 1860's cases that it said were of "questionable relevance" because they were decided "years later." 467 F. 3d at 415(App. a15). This rejection of *Farnum* overlooks that the case relied on *Pinckney v. Henegan*, *supra*, which was decided before the 1860's.

Farnum quoted *Pinckney's* statement that"[t]he public records in the Secretary of State's office do not belong to the Secretary; *they are the property of the State*. He is the mere keeper under her authority Whatever she wills about them, he is bound to obey." (emphasis as written). 53 S.E. at 85; 2 Strob.

250, 1848 Wl. 2877, 2. In an unduly narrow, erroneous reading, the Panel found that this quote did ". . . not elucidate the underlying question of what documents qualify as public records," (467 F. 3d at 415 (App. a15)), but *Farnum* applied *Pinckney* more broadly. *Farnum* used the *Pinckney* quote to support its conclusion that a law was not necessary to force a public official, a State dispenser, to permit access to the records in his office because those records are public property. Therefore, rather than being a new common law rule, *Farnum*'s conclusions regarding the common law are in a continuum with the *Pinckney* case and reflect common law that preceded the documents in question. Chief Justice Jean Hoefer Toal of the South Carolina Supreme Court, in a law review article, herself recognized that *Pinckney* is a "common law decision." Jean Hoefer Toal, and Brandon Riley, *The New Role of Secret Settlements in the South Carolina Justice System*, 55 S.C.L. 761, 762 (2004). Therefore, the application of *Pinckney* is not limited to records at the Secretary of State's Office, and *Farnum* is not limited to dispensary records.

The Panel also misread *Farnum* in finding that it and two other cases "concern other types of records than papers of executive officials." 467 F. 3d at 415 (App. a15). *Farnum* applied its decision to "any"officer (*supra*) and stated that "[t]he offices and place of business of the dispensary stand precisely in the same relation to the state as the State Treasurer's office" meaning that the dispenser could no more withhold public documents than could the Treasurer. That decision is readily applicable to the Governors' records at issue in the instant case as is the common law holding of *Pinckney* which the Court of Appeals had also noted did not specifically refer to Governors' records.

Although the Panel discussed Federal law as to Federal documents which is inapplicable to the States, it overlooked that *Farnum* is consistent with common law at the state level.

AmJur *Records* §3 states that "[i]t is the nature and purpose of a record, rather than the place where it is kept, that determines its status as a public record." *See also, State v. Biscoe*, 537 P.2d 968, 969 (AZ 1975); *Fargnoli v.Cianci*, 397 A.2d 68, 76 n. 9 (R.I. 1979). " . . . [P]ublic records and documents are the property of the state and not of the individual who has them in his or her possession, [footnote omitted] . . ." AmJur *Records* §11.

The ruling in *Farnum* is very broad, and clearly applies to the Governors' Documents at issue as found by the Bankruptcy Court. It answers the Panel's question as to "what documents qualify as public records" and rebuts any presumption of ownership in Mr. Willcox due to possession. 467 F. 3d at 415 (App. a15) A reasonable reading of *Pinckney* also supports State's ownership. The Court of Appeals should have relied on *Farnum* and the other authority discussed above and reversed the District Court.

C. Statutes

The Panel also gave an unduly narrow reading to statutes at the time. Although the statutes did not specify "ownership", they certainly support the Bankruptcy Court's conclusion that the Documents are public property.

In the early 1700's, a Colonial statute actually enacted by the Governor ". . . with the advice and consent of the Counsel and representatives. . ." provided, in part, that ". . . nothing is more necessary for the well-being of a Colony than the preservation of the publick [sic] records . . . ". Act No. 405, 1719, Vol 3, Statutes at Large (Cooper, 1838), App. a86. The Act addressed the situation that persons had "made away" with or concealed a number of different records. This Act provided for the recovery of a penalty from those who did not return the records within a specified period of time, and provided for a

reward for those who discovered concealed records. This statute appears to have been in effect at the time the Documents were created and certainly demonstrates an intent of the Governor to make broad use of the term "publick records" which would include the Documents in question.[15]

Act No. 1448 of 1789, Vol. 5, Statutes at Large (Cooper, 1839), p. 102, provided that ". . . all the public records, except such as relate to the property within the districts of Charleston, Georgetown, and Beaufort, shall be removed to Columbia." (App. a86). As found by the Bankruptcy Court, this ". . . removal process specifically referenced the Governor's involvement in procuring the preservation and removal of public records . . . ." 329 B.R. at 564 (App. a52). Therefore, from the outset of this State as a colony and through the period during which the Documents in question were prepared, the preservation and storage of the public records of this State remained a public policy and one in which the Governor was involved.

Certainly, the Governor had reason to keep copies of records. The 1790 Constitution provided that "[a]ll officers in the executive department, when required by the governor, shall give him information in writing, upon any subject relating to the duties of their respective offices." art. II §11 . That Constitution also provided that the Governor was to provide information to the General Assembly as to the State's condition and recommend necessary or expedient measures. *Id* at §12. These responsibilities would generate records as to public

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[15]The Act was listed in 1871 among those statutes that had expired or been repealed or were thereby expressly repealed. General Statutes of South Carolina, 1871, p. 711. That this statute was in the 1838 Statutes at Large shows that it was still in effect then, and it does not appear to have been repealed prior to 1871.

business, and for many years, annual appropriations provided for a "Private Secretary" and a "Messenger"for the Governor. *See, eg*, Act No. 2886, 1843, the Statutes At Large of South Carolina, 1873, Vol. XI, p. 271; Act. No. 4567 of 1861, Vol. XIII, Statutes At Large, 1875, p. 4; Act No. 4700 of 1864, *Id.* at p. 199. These statutes provided for the Governor to account to the legislature annually for the appropriations to his Office.

The duties and reporting requirements of the Governor increased greatly in 1861. The 1861 Constitution specifically stated that the "[e]xecutive authority of the State shall be vested in a Governor.. . ." Art. II §1, Const. 1861,Electronic Edition. *at http:// www.docsouth.unc.edu/ southcar/south.html* (First edition, 1999, University of North Carolina at Chapel Hill). That Constitution also contained provisions for the Executive Department officers to give him information in writing and for the Governor to give information to the legislature. art. II §§8 and 9.

Further provision for Executive Offices was made in December 1865 by Act 4754, Statutes at Large of South Carolina, Vol. XIII, 1875, p. 340. App. a87. The Act contained detailed record keeping provisions for the Governor, and also proved that the Secretary of State was to "collect , deposit and keep in Columbia all the books, records and papers heretofore belonging to["the Executive Chamber"]. *Id.*, §IV, p. 341 (App. a87). Although this statute followed the creation of the records in question, it gave the Secretary of State the responsibility of collecting any records of the Office of the Governor that were missing or stored elsewhere which would include the Documents in question in this case.

The Bankruptcy Court found that the 1865 statute "weaken[ed] the Plaintiff's argument that Governor's records have always been considered private and that the State has historically kept few record keeping requirements.[footnote

omitted]." 329 B.R. at 567 (App. a66). In another striking conflict over the interpretation of South Carolina law, the Court of Appeals reached an opposite conclusion in stating that the 1865 statute "strongly suggests that, prior to that time, such papers were *not* so regulated.[footnote omitted]" 467 F. 3d at 416 (App. a17)

The fact findings, case and statutory law all provide a strong basis for a conclusion that South Carolina owns the Documents. Instead, the Court of Appeals read South Carolina cases and statutes exceedingly narrowly and departed from the Bankruptcy Court's fact findings with the result that the Court deprived that authority of its meaning and reached a decision about South Carolina law that was plainly wrong. It should have either ruled in favor of the State or certified the State law issues to the South Carolina Supreme Court. In ruling as it did, the Court of Appeals has in effect nullified South Carolina law. *Leavitt*, *supra*.

D. Willcox's Statute of Limitations and Staleness Defenses Do Not Apply

As noted above, the Bankruptcy Court ruled against Willcox on his statute of limitations and staleness defenses to the State's position that it owned the Documents. The District Court reversed on those issues, but the Court of Appeals did not reach those defenses. *Arguendo*, should this Court want to consider them, those issues are briefly addressed below.

The Bankruptcy Court concluded that the communications between Annie Storm and Mr. Meriwether of the Caroliniana Society in the 1940's did not place on notice the Historical Commission, the predecessor to the Department of Archives, which had the official statutory duty to collect historical Documents such as those presented in this case. 329 B.R. at 574-575. (App. a75-a76). *See* p. 6, *supra*. As properly

found by the Bankruptcy Court, Mr. Meriwether lacked capacity to bind the State even as an employee of the Caroliniana Library of the University of South Carolina because he was not an employee of the Historical Commission which would have needed to be aware of the Documents to be barred from asserting a claim. 329 B.R. at 575, (App. a76).

The Bankruptcy Court also found no merit to Willcox's staleness defense because no "unexplained delay" in asserting a claim had been shown in sufficient magnitude. 329 B.R. at 577 (App. a79). The District Court disagreed (App. a37) for reasons based largely on improper departures from the Bankruptcy Court's fact findings related to notice to or knowledge of the State regarding the existence of the documents. Rule 8013, Federal Rules of Bankruptcy Procedure. The State did not have notice or knowledge of the Documents for the reasons discussed above.

The position of the State and Stroup is that the Bankruptcy Court ruling was correct as to staleness, standing and ownership. The Court of Appeals should have either ruled outright that the State owned the Documents or it should have certified the ownership issues to the South Carolina Supreme Court.

III. THE FAILURE TO CERTIFY STATE LAW QUESTIONS TO THE STATE SUPREME COURT CONFLICTS WITH THE DECISION OF THE UNITED STATES SUPREME COURT AND OTHER COURTS OF APPEALS

The Court of Appeal's failure to certify the State law questions in this case not only violates *Erie*, but demonstrates a much narrower view of its certification powers that conflicts with principles of federalism recognized by the other Circuits

and the United States Supreme Court. [16] As noted, the Court of Appeals made rulings on the State law issues in this case directly contrary to those of the Bankruptcy Court despite its conclusion that the case "poses questions which [the Court is] ill equipped to answer." (467 F. 3d at 413 (App. a11) (emphasis added). The Court of Appeals should have certified those State law questions in this case under Rule 228, South Carolina Rules of Appellate Procedure when the Court of Appeals in effect found "no controlling precedent under South Carolina law" as to the ownership of 1860's government documents.[17]

"Through certification of novel or unsettled questions of state law for authoritative answers by a State's highest court, a

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[16] The State has preserved the certification issue at each level of Court including in its Motion for Certification in Bankruptcy Court which that Court ruled the motion moot when it ruled in favor of the State on the ownership issues. Pet. for Rehearing, etc. and Rehearing En Banc; J.A. pp. 37, 165, 1112; District Court brief, State and Stroup p. 28, n. 17; Court of Appeals brief, State and Stroup, p. 37, n. 9. In the Chief Justice's Opinion denying the Application for a Stay of the Mandate, the Court stated that the Certification issue ". . . was only mentioned by applicants in passing in the court below." 549 U.S. ___. When certification can be undertaken at any time, and the Bankruptcy Court's conclusions about State law and the ownership of the Documents were very sound, the State should not have been forced to argue more strongly that the issue should be certified.

[17] Rule 228 , SCACR provides as follows:

> The Supreme Court [of South Carolina] in its discretion may answer questions of law certified to it by an federal court of the United States . . . if there are involved . . . questions of law of this state which may be determinative of the cause then pending in the certifying court when it appears to the certifying court there is not controlling precedent in the decisions of the Supreme Court.

federal court may save "time, energy, and resources and hel[p] build a cooperative judicial federalism." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (2002) (emphasis added), citing *Lehman Bros. v. Schein*, 416 U.S. 386, 391(1974)[18]; *see also*, *Elkins v. Moreno*, 437 U.S. 647, 662, n. 16 (1978). *Arizonans* found that ". . . [g]iven the novelty of the question and its potential importance to the conduct of Arizona's business, plus the views of the Attorney General and those of Article XXVIII's sponsors, the certification requests merited more respectful consideration than they received in the proceedings below." 520 U.S. at 78. The Court ultimately vacated the decisions below and directed that the District Court dismiss the actions.

These factors for certification apply here, but were not followed. The Court of Appeals in effect found the questions in the instant case novel since it found insufficient guidance in State law, and the question is certainly important to the State's business because the Documents are government records. *Arizonans* considered also the views of the Attorney General, and in the instant case, the position of the State's Attorney General as well as the State's Department of Archives is that these documents are State property.

Numerous Circuits, including the Fourth Circuit, have recognized the importance of certification to federalism. *See eg*, *National Capital Naturists v. Board of Supervisors*, 878 F.

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[18] Although *Lehman Bros.* recognized that whether to certify "rests in the sound discretion of the federal court," (416 U.S. at 391), it vacated the Court of Appeals decision in that case so that the Circuit Court could consider whether the controlling State law issue should be referred to the State's Supreme Court.

2d 128, 131 (4th Cir. 1989), citing *Lehman Bros., supra*; *Medical Professional Insurance Co. v. Breon Laboratories, Inc.*, 141 F. 3d 372, 376 (1st. Cir. 1998); *Home Insurance Co. v. American Home Products, Corp.*,873 F. 2d 520, 522 (2d Cir. 1989); *Delta Funding Corp. v. Harris*, 466 F. 3d 273, n. 1 (3d Cir. 2006); *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 668 (5th Cir,2006)(quoting *Lehman*). *Blue Cross Blue Shield of Alabama v. Nielsen, supra*, 116 F3d at 1412 stated as follows:

> . . .state law issues are unavoidable. The question is who should decide those issues, and we do not think that is a close question at all. The final arbiter of state law is the state supreme court, which is another way of saying that Alabama law is what the Alabama Supreme Court says it is . . .
>
> Certification of state law issues to state supreme courts is a valuable tool for promoting the interests of cooperative federalism. . . .

Accordingly, instead of following the Eleventh Circuit's approach, the Court of Appeals has made a significant decision regarding the South Carolina law that is absolutely contrary to the decision reached by the Bankruptcy Court a year ago and conflicts with principles of federalism recognized by the Eleventh Circuit and other Courts of Appeals. Also, as noted above, the Court could have avoided the *Erie* problems in this case if it had certified the state law issues in this case. *See, eg., Mosher, supra.*

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted to review the Opinion of the Court of Appeals.

Respectfully submitted,

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February 21, 2007

APPENDICES

OPINIONS AND ORDERS

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APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed
November 28, 2006

No. 06-1179
2:05-cv-02788-PMD
04-09605-JW

Thomas Law **WILLCOX,** Debtor-Appellee,

and

John M. **Willcox;** Kathryn **Willcox** Patterson, Defendants-Appellees,

v.

Rodger STROUP, Director, South Carolina Department of Archives and History; State of South Carolina ex rel. Henry McMaster, Attorney General for the State of South Carolina, Defendants-Appellants.

On Petition for Rehearing and Rehearing En Banc

The appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Wilkinson, Judge Niemeyer, and Judge Hudson, United States District Hudge sitting by designation.

For the Court,

/s/ Patricia S. Connor

_____

CLERK

APPENDIX II

United States Court of Appeals,

Fourth Circuit.

Thomas Law **WILLCOX,** Debtor-Appellee,

and

John M. **Willcox;** Kathryn **Willcox** Patterson, Defendants-Appellees,

v.

Rodger STROUP, Director, South Carolina Department of Archives and History;

State of South Carolina ex rel. Henry McMaster, Attorney General for the State

of South Carolina, Defendants-Appellants.

No. 06-1179.

Argued Sept. 20, 2006.

Decided Oct. 27, 2006.

Before WILKINSON and NIEMEYER, Circuit Judges, and Henry E. HUDSON, United States District Judge for the Eastern District of Virginia, sitting by designation.

ARGUED: James Emory Smith, Jr., Assistant Deputy Attorney General, Office of the Attorney General of South Carolina, Columbia, South Carolina, for Appellants. Kenneth Charles Krawcheck, Charleston, South Carolina, for Appellees. ON BRIEF: Henry D. McMaster, Attorney General, Robert D. Cook, Assistant Deputy Attorney General, Office of the

Attorney General of South Carolina, Columbia, South Carolina, for Appellants.

OPINION

WILKINSON, Circuit Judge.

This case concerns the ownership of papers from the administrations of two governors of South Carolina during the Civil War. Debtor-plaintiff Thomas Law Willcox sued in United States Bankruptcy Court for a declaratory judgment that the papers were part of his estate. Defendant South Carolina contends that the papers are public property. The bankruptcy court held for the State. The district court reversed, holding that the State failed to establish that the papers constituted public property under South Carolina law of the Civil War era. Because the long possession of the papers by the Willcox family creates a presumption of ownership in their favor and the State has adduced insufficient evidence to defeat this presumption, we affirm.

I.

The debtor-plaintiff is Thomas Law Willcox ("Willcox"), a South Carolina resident whose family has lived in the state for many years. The defendants are Rodger Stroup, Director of the South Carolina Department of Archives and History, and the State of South Carolina (collectively "State"). Willcox's ownership claims against two other defendants, his sister Kathryn Willcox Patterson and cousin John M. Willcox, await the outcome of this proceeding.

At issue in this case are approximately 444 documents from the administrations of South Carolina Governors Francis

Pickens (1860-62) and Milledge Bonham (1862-64). As the district court described them, "The Documents, which date from between December 1860 and August 1864, concern Confederate military reports, correspondence, and telegrams between various Confederate generals, officers, servicemen, and government officials, and related materials. The Documents also address a wide variety of official duties of the Governor during that time period.... [T]he court adopts the Bankruptcy Court's finding of fact that the Documents are properly described as Governor's records relating 'to matters of military significance, police powers, as well as to other duties of the Governors during the relevant time period.' " The collection has been appraised at $2.4 million.

Willcox found the papers in 1999 or 2000 in a shopping bag in a closet at his late stepmother's home. After finding the papers, Willcox sold a few of them to various individuals and gave two to his wife. In May 2004, Willcox scheduled an auction for August 7, 2004 to sell the remaining documents. The auctioneer publicized the upcoming sale and was contacted by defendant Stroup, who sought permission to microfilm the papers for the State Archives prior to auction. Willcox authorized the copying, and the papers were microfilmed. On the day before the auction, August 6, 2004, Stroup and the Attorney General's Office for the State of South Carolina obtained a temporary restraining order in state court enjoining the sale of the papers.

On August 16, 2004, Willcox filed for Chapter 11 bankruptcy protection in the United States Bankruptcy Court of the District of South Carolina. Willcox then filed a complaint in the bankruptcy court seeking a declaratory judgment that the papers were property of the bankruptcy estate. After a two-day bench trial, the bankruptcy court held the State to be the owner of the papers under South Carolina law. The district court

reversed.

Regarding the papers' history, the bankruptcy and district courts found, and we adopt, the following facts. The papers seem to have come into Willcox's family through his great-great-uncle, Confederate Major General Evander McIver Law, who most likely came into possession of them during the February 1865 attack on the South Carolina capital by Union General William Tecumseh Sherman. On February 15, 1865, in anticipation of imminent attack, Governor A.G. Magrath declared martial law in Columbia and appointed General Law the Provost Marshal of the city. On February 16, 1865, a large number of State archives and records were removed from Columbia for safekeeping. On February 17, 1865, General Law was relieved of his duties as Provost Marshal, and General Sherman took control of Columbia. The parties submit no direct evidence of how General Law came into possession of the papers, nor is there any suggestion that he did so illegally.

On February 16, 1896, General Law wrote a letter to a New York book dealer regarding the sale of some letters which, both parties agree, appear to belong to the collection at issue here. By the 1940s, Mrs. Annie J. Storm, the granddaughter of General Law, was in possession of the papers and attempted to sell them to both the University of North Carolina at Chapel Hill ("UNC") and the South Caroliniana Library of the University of South Carolina. Mrs. Storm described the documents as "original State House papers entrusted to [her] grandfather at the time of the surrender." No sale resulted, but the papers were placed on microfilm at the Southern Historical Collection at UNC.

No evidence has been submitted of the papers' movements between the time of the Storm correspondence and

plaintiff Willcox's discovery more than fifty years later. The point for present purposes is simply that, while the precise route by which Civil War-era gubernatorial papers arrived in a shopping bag in Thomas Law Willcox's stepmother's closet remains a mystery, it appears that the papers have been in the possession of the Law and Willcox families for over one hundred and forty years.

The district court had jurisdiction over the initial appeal under 28 U.S.C. § 158(a). We possess appellate jurisdiction under 28 U.S.C. § 158(d). "[W]e review the bankruptcy court's factual findings for clear error, while we review questions of law *de novo." Logan v. JKV Real Estate Servs. (In re Bogdan),* 414 F.3d 507, 510 (4th Cir.2005).

II.

The exceptional nature of the papers in dispute--their early vintage, their unknown history--presents issues distinct from those of the typical personal property case. Without the benefit of clear chain of title, evidence of original ownership, eyewitness testimony, and any number of documentary aids usually helpful in the determination of ownership, the court must utilize the legal tools that remain at its disposal. In this situation, tenets of the common law that usually remain in the background of ownership determinations come to the forefront, their logic and utility revealed anew.

That possession is nine-tenths of the law is a truism hardly bearing repetition. Statements to this effect have existed almost as long as the common law itself. *See Oxford English Dictionary* (draft rev.2003) (citing a 1616 collection of adages for "Possession is nine points in the Law"). *See also* Frederick Pollock & Robert Samuel Wright, *An Essay on Possession in the Common Law* 5 (1888) ("[I]n the eyes of medieval lawyers

... Possession largely usurped not only the substance but the name of Property.").

The importance of possession gave rise to the principle that "[p]ossession of property is indicia of ownership, and a rebuttable presumption exists that those in possession of property are rightly in possession." 73 C.J.S. *Property* § 70 (2004). The common law has long recognized that "actual possession is, prima facie, evidence of a legal title in the possessor." William Blackstone, 2 *Commentaries* *196. *See, e.g.*, Edward Coke, 1 Commentary upon Littleton 6.b. (19th ed. 1832) (strong presumption of ownership created by "continuall and quiet possession"); *Jeffries v. Great W. Ry. Co.* (1856) 119 Eng. Rep. 680 (K.B.) ("[T]he presumption of law is that the person who has possession has the property.").

This presumption has been a feature of American law almost since its inception. "Undoubtedly," noted the Supreme Court, "if a person be found in possession ... it is prima facie evidence of his ownership." *Ricard v. Williams,* 20 U.S. (7 Wheat.) 59, 105, 5 L.Ed. 398 (1822). Almost eighty years later, the Court reaffirmed, "If there be no evidence to the contrary, proof of possession, at least under a color of right, is sufficient proof of title." *Bradshaw v. Ashley,* 180 U.S. 59, 63, 21 S.Ct. 297, 45 L.Ed. 423 (1901). *See also,* Oliver Wendell Holmes, *The Common Law* 241 (1881) ("The consequences attached to possession are substantially those attached to ownership, subject to the question of the continuance of possessory rights....").

In South Carolina law, too, it is well established that, absent evidence of superior title, "[t]he law ever presumes in favor of possession, for possession alone is prima facie evidence of a good title." *Gourdin v. Theus,* 5 S.C.L. (3 Brev.)

153, 171 (S.C.Const.1808). *See, e.g., Stephenson Fin. Co. v. Wingard (Ex parte Dort),* 238 S.C.506, 121 S.E.2d 1, 3 (S.C.1961); *Jackson v. Frier,* 146 S.C. 322, 144 S.E. 66, 69 (1928); *Thompson v. Chapman,* 107 S.C. 461, 93 S.E. 142, 143 (S.C.1917). In this case, the possession of the Law and Willcox families triggers the presumption of their ownership of the papers.

The presumption of possession is not confined to the early nineteenth century, nor is it confined to examples of early Americana. Rather, it applies across the law of personal property. *See, e.g., Nesbitt v. Lewis,* 335 S.C. 441, 517 S.E.2d 11, 14 (Ct.App.1999) (ownership of dog); *Hammond v. Halsey,* 287 S.C. 46, 336 S.E.2d 495, 497 (Ct.App.1985) (ownership of cannon); *Clanton's Auto Auction Sales, Inc. v. Harvin,* 238 S.C. 352, 120 S.E.2d 237, 239 (1961) (ownership of automobile). The unusual circumstances of this case do, however, provide a notable illustration of why such a presumption exists in the first place.

First and foremost, the presumption operates to resolve otherwise impenetrable difficulties. Where neither party can establish title by a preponderance of the evidence, the presumption cuts the Gordian knot, determining ownership in favor of the possessor. This case shows the need for such a default rule. It presents questions the answers to which remain a mystery. Little is known of the papers' whereabouts, status, or movements from their creation to their acquisition by General Law. There is no evidence of how General Law acquired the papers. Not even the chain of possession within the Law and Willcox families has yet been determined with any certainty. In fact, in over one hundred and forty years of existence, these papers have apparently surfaced in the historical record only three times: in General Law's 1896 correspondence, in Annie Storm's 1940's correspondence, and

in the current litigation.

This case thus poses questions which we are ill equipped to answer. Fortunately, however, the common law reveals its usefulness even in the acknowledgment of its limitations. The presumption of ownership from possession locates the parties' burdens. Where the party not in possession is able to establish superior title by satisfactory evidence, the presumption gives way in favor of this evidence. But where no such evidence is produced-- where, as here, the events at issue are impossible to reconstruct--the presumption recognizes and averts the possibility of a court's presiding over a historical goose chase. *See* Richard A. Posner, *Economic Analysis of Law* 78 (6th ed.2003).

Second, the presumption of ownership in the possessor promotes stability. "It is the policy and even the duty of the law, to have personal property vested as early as practicable." *Collins v. Bankhead,* 32 S.C.L. (1 Strob.) 25, 29 (S.C.Ct.App.1846). The presumption of ownership from possession is one of an array of legal principles designed to this end. The presumption means that, absent proof to the contrary, settled distributions and expectations will continue undisturbed. Even where evidence overcomes the presumption, other principles work to protect settled expectations, including the statute of limitations, the doctrine of adverse possession, and equitable defenses such as laches, staleness, abandonment, and waiver.

Such principles, working in concert, favor status-quo distributions over great upsets in property rights. At the most basic level, this fosters "the policy of protecting the public peace against violence and disorder." *See Sabariego v. Maverick,* 124 U.S. 261, 297, 8 S.Ct. 461, 31 L.Ed. 430 (1888).

In contemporary commercial society, it protects the expectations of those in possession, thus encouraging them to make improvements that increase social wealth. *See, e.g.*, Richard A. Posner, *Economic Analysis of Law* 80-84 (6th ed.2003); Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 Yale L.J. 357, 398 (2001) ("[T]he refined problems of concern in advanced economies exist at the apex of a pyramid, the base of which consists of the security of property rights."). Without rules such as the presumption of ownership, whether public or private, such valuable goals would give way to uncertainty.

In this case, the resulting confusion is not difficult to imagine. If the State were not required to defeat the presumption in order to gain title, a whole system of archival practice could be thrown into question. The State could claim ownership of other papers of Governors Pickens and Bonham held by the Library of Congress and Duke University, as well as papers of other South Carolina governors currently at institutions other than the State Archives. The result would be immense litigation over papers held by private owners, universities, historical societies, and federal depositories. It would upset settled archival arrangements and the expectations of institutions and historical scholars alike. Disregard of possession as presumptive evidence of ownership would throw the whole of this important area into turmoil.

Finally, while it has never been the practice of federal courts to ignore the law in favor of equitable considerations, *see E. Tenn. Natural Gas Co. v. Sage*, 361 F.3d 808, 823 (4th Cir.2004), it is worth noting that the employment of the presumption in this case in no way frustrates the public interest. Here, private possession does not shut the papers off from access by scholars or, indeed, by the interested public. They have been available for study for decades on microfilm at the

University of North Carolina at Chapel Hill, and through the permission of plaintiff Willcox the South Carolina Department of Archives and History now also has a copy on microfilm. The papers are thus freely available for perusal and study regardless of who owns the originals. And, of course, if the State values possession of the original documents, it may acquire them on the open market.

In short, the common law, through the presumption of ownership in the possessor, resolves otherwise insoluble historical puzzles in favor of longstanding distributions and long-held expectations. Such a rule both protects the private interests of longtime possessors and increases social utility. Of course, this presumption will not always cut in one direction. In many instances, the State will possess the papers, and it will then be entitled to the strong presumption that the private party claims here. In this case, however, where the Law and Willcox families have been in possession for well over a century, the presumption favors plaintiff Willcox.

III.

Having recognized the presumption in favor of Willcox's ownership, the court must consider whether the State has rebutted this presumption. Under South Carolina law, the burden is on the party not in possession to prove title superior to that of the possessor. *See Hammond,* 336 S.E.2d at 497. In most cases, the party not in possession would attempt to meet its burden through factual evidence, such as evidence of title or of recent prior possession. [1]

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[1]The presumption of ownership from possession gives way to evidence of superior title. *See Gourdin,* 5 S.C.L. at 171 ("But whenever the claimant shews a legal title, the evidence of possession alone, unsupported by any written document, ought not

In this case, the State has been unable to provide such evidence. There is no documentary evidence of the State's title, nor is there evidence of its recent possession. While there is no suggestion that the Law and Willcox families are bona fide purchasers, since no purchase was involved, there is also no indication that they acquired the papers in bad faith. In any case, the State's burden may not be met by challenging the sufficiency of the possessor's title but only by proving the superior strength of its claim. *See id.*

Given the insufficient factual evidence,[2] the State's remaining argument for ownership is that, under the law at the

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to prevail. The presumption of a good title is rebutted; and other evidence than mere possession, becomes necessary.").

Even if the State had been able to show evidence of superior title, however, that would not be the end of the matter. After the party out of possession establishes superior title, the possessor may still raise a number of defenses, including the statute of limitations and equitable defenses such as staleness, laches, waiver, and abandonment. *See, e.g., O'Keeffe v. Snyder*, 83 N.J. 478, 416 A.2d 862 (1980) (artist barred from reclaiming stolen paintings where she did not diligently pursue recovery of stolen works).

[2]The State attempts to argue that because, as a factual matter, the papers were produced during the administrations of two South Carolina governors, they are of necessity public property. This argument begs the question. The content of the papers and the conditions of their production are not in dispute. The entire question is whether gubernatorial papers such as these constitute public property. That the papers were produced in an official context is simply insufficient to demonstrate title.

time of the documents' creation (1860-64) or their acquisition by General Law (1865),[3] they were public property. South Carolina law of the relevant time period provides no basis for the State's claim of ownership.

A.

South Carolina case law does not suggest that such papers were public property during the Civil War era. *Pinckney v. Henegan*, 33 S.C.L. (2 Strob.) 250, 252 (S.C.App.L.1848), merely stated that "[t]he public records in the Secretary of State's office do not belong to the Secretary; they are property of the State." The case did not refer to governors' papers or otherwise explain the nature of the records on file in the Secretary's office. It simply stated that public records are public property. This proposition does not elucidate the underlying question of what documents qualify as public records.

The other cases cited by the State were decided years after the time period in question. *See, e.g., Sternberger v. McSween*, 14 S.C. 35 (S.C.1880); *In re Whipper*, 32 S.C. 5, 10 S.E. 579 (1890); *State ex rel. Hay v. Farnum*, 73 S.C. 165, 53 S.E. 83 (1905). As such, they are of questionable relevance to the common law as it existed in the early 1860s. In addition, the cases all concern other types of records than papers of

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[3] The parties have made arguments relating to both time periods. The district court framed the question in terms of the law at the time of the documents' creation but also considered the state of the law in 1865, the time of their likely acquisition by General Law. Because the two events, creation and acquisition, occur within a matter of years of each other, the choice between them does not affect the outcome.

executive officials. Unlike deeds of property or birth and death certificates or creditors' liens, *see Sternberger,* 14 S.C. at 38, or bills of indictment, *see State v. West,* 31 N.C.App. 431, 229 S.E.2d 826 (1976), governors' records have both public and private aspects. Cases involving other types of records shed limited light on whether the gubernatorial papers in question were public property.

A.

South Carolina statutory law does not indicate that gubernatorial papers were public property at the relevant time. The State cites a 1719 statute addressing the preservation of public records and providing penalties for individuals who had "made away" with various records. *See* Act No. 405 of 1719, 3 S.C. Stat. at Large 98 (1838). The State also cites a 1789 act providing for the removal of public records to Columbia under the supervision of the governor. *See* Act No. 1448 of 1789, 5 S.C. Stat. at Large 102 (1839). Citation of such statutes, however, again begs the question of what documents were considered to be public records in the first place.

In addition, the State cites numerous nineteenth-century statutes, as well as the 1790 and 1861 Constitutions of South Carolina, which required the governor to submit various reports to the legislature. *See, e.g.,* S.C. Const. of 1790, art II § 12; S.C. Const. of 1861, art II § 12; Act No. 2886 of 1843, 11 S.C. Stat. at Large 270 (1873); Act No. 4567 of 1861, 13 S.C. Stat. at Large 4 (1875); Act No. 4700 of 1864, 13 S.C. Stat. at Large 199 (1875). While these requirements might make it necessary for the governor to keep accurate records, they are not relevant to the question of the ownership of such records, let alone gubernatorial papers more broadly.

The State also references two statutes passed after the

events in question. First, an Act passed by the South Carolina legislature in December 1865 provided that future governors were to have a "suitable office" called the Executive Chamber, in which all papers associated with their administration were to be kept. *See* Act 4754 of 1865, 13 S.C. Stat. at Large 340 (1875). The Act also provided that the Secretary of State was to "collect, deposit and keep in Columbia all the books, records, and papers heretofore belonging [to the Executive Chamber]." *Id.* The passage of this law in December of 1865 strongly suggests that, prior to that time, such papers were *not* so regulated.[4] In addition, the Act sheds no light on the question of what papers "heretofore" belonged to the Executive Chamber, and the State has provided no evidence that, prior to the passage of this Act, the papers at issue would have belonged to that category.

Second, the current South Carolina Public Records Act, S.C.Code Ann. § 30- 1-10 et seq. (1991 & Supp.2005), provides for the maintenance of certain public records. This Act, which first appeared in the South Carolina Code of Laws in 1962, cannot possibly support the State's characterization of the law as it existed in the Civil War era. Whether the Act's definition of "public record" even now includes records of the governor's office is a question we need not address. *See* S.C.Code §§ 30-4-20(a),©.

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[4] We need not consider what effect the December 1865 Act had on gubernatorial papers going forward. The Act provides that all papers generated during a governor's administration should be kept in the Executive Chamber during that administration, but it does not explicitly state what should become of those papers at the close of an administration.

C.

Moreover, the nineteenth-century understanding of South Carolina common and statutory law appears to support this court's interpretation. While the State Archives has at least some records of almost every South Carolina governor since 1860, of all the State's governors from the colonial period through 1866, the Archives contains the original papers of only one, Governor Edward Drayton (1800-02, 1808-10). Governor Drayton, in fact, complained to the legislature of the "careless" approach to state papers and proposed that the legislature pass a law requiring governors to maintain indexed journals for their successors. No such law was passed. Later governors continued to exercise control over their papers. A letter of May 11, 1883, from former Governor Magrath, governor at the time of Sherman's attack, to former Governor Bonham, some of whose papers are in dispute here, suggests that some of Governor Magrath's papers were returned to him by a later governor. The letter also states that Governor Pickens, the other governor whose papers are in dispute in this case, had many of his papers in his personal possession. This evidence suggests that governors of the Civil War era may have assumed private possession and control of gubernational papers.

Even in the twentieth century some South Carolina governors made donations of their papers more consistent with private than public ownership. Governor Strom Thurmond (1947-51) donated his papers to Clemson University. Governor Ernest F. Hollings (1959-1963) donated a portion of his papers to the University of South Carolina, as did Governor Robert McNair (1965-71). These donations suggest that even twentieth-century South Carolina governors have exercised a right of transfer over their papers, a right at the core of the bundle of rights known as property ownership. *See Black's Law Dictionary* 1138 (8th ed.2004).

In this respect, the practice in South Carolina accords with common law practice more generally. Presidential papers, for example, were considered private property from the time of George Washington, who following his second term removed his papers to Mount Vernon and bequeathed them in his will to his nephew, Supreme Court Justice Bushrod Washington. *See Nixon v. United States*, 978 F.2d 1269, 1278 (D.C.Cir.1992). Jefferson, Madison, and Monroe also bequeathed their papers as private property by will. *See id.* When Congress first provided public funding for presidential libraries, such libraries depended upon former presidents to deposit their papers voluntarily. *See* Presidential Libraries Act of 1955, Pub.L. No. 84-373, 69 Stat. 695 (codified as amended at 44 U.S.C. § 2112 (2000)).

For Congress to change this private ownership regime required a law prospectively granting the United States "complete ownership, possession, and control" of official presidential records. *See* Presidential Records Act of 1978, 44 U.S.C. § 2201 et seq. (2000) (implementing process for archiving records and making them publicly available as soon as possible, subject to exceptions for confidential and privileged materials). A previous law, the Presidential Records and Materials Preservation Act of 1974, Pub.L. 93-526, 88 Stat. 1695, which exerted federal control over former President Nixon's papers in the wake of the Watergate scandal, was determined to have effected a per se taking of President Nixon's property interest in his papers. *See Nixon*, 978 F.2d at 1284.

We conclude that the State has failed to establish that South Carolina law at the relevant time treated gubernatorial papers as public property. This conclusion leaves the State with no basis upon which to rebut the strong presumption of possession in the Law and Willcox families and no basis upon which to claim title superior to that of plaintiff Willcox. We

note that the district court further held that "the State is barred from asserting an ownership interest in the Documents due to the running of the statute of limitations and staleness." While we have no reason to question this aspect of the district court's ruling, the State's failure to establish superior title renders it unnecessary to address it.

The judgment of the district court is hereby affirmed.

AFFIRMED.

APPENDIX III

United States District Court,

D. South Carolina,

Charleston Division.

Thomas Law WILLCOX, Appellant,

v.

Rodger STROUP, Director, South Carolina Department of Archive and History;

State of South Carolina, ex rel. Henry McMaster, Attorney General for the State

of South Carolina, John M. Wilcox, and Kathryn Willcox Patterson, Appellees.

C.A. No. 2:05-2788-PMD.

Jan. 12, 2006.

ORDER

PATRICK MICHAEL DUFFY, United States District Judge.

In an order filed August 15, 2005, United States Bankruptcy Judge John Waites ruled that certain Civil War era documents in the possession of Appellant Thomas Law Willcox ("Appellant") were not to be considered a part of his estate and that the State of South Carolina (the "State" or "Appellee") met its burden of proving superior title to these documents. This matter is before the court upon Appellant's appeal from this final decision of the Bankruptcy Court.

DISCUSSION

Under 28 U.S.C. § 158(a), United States District Courts have jurisdiction to hear appeals of final judgments, orders, and decrees of Bankruptcy Courts. [1] On an appeal the district court may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings. Fed. R. Bank. P. 8013. The court has reviewed the file and determines that oral argument is not necessary. *Id.* ("Oral argument shall be allowed in all cases unless the district judge determines after examination of the briefs and record, or appendix to the brief, that oral argument is not needed.").

Bankruptcy Court's Findings of Fact

The Bankruptcy Court's findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses. *Id.* After reviewing the Bankruptcy Judge's findings of fact, the court finds that there are no clear errors

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[1] 28 U.S.C. § 158 provides:

(a) The district courts of the United States shall have jurisdiction to hear appeals

(1) from final judgments, orders, and decrees;

(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3) with leave of the court, from other interlocutory orders and decrees;

and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

therein. Accordingly, the court adopts all of the Bankruptcy Court's findings of fact. The relevant facts are as follows:

Appellant Willcox possesses approximately 444 documents (the "Documents") consisting of the records of two former Governors of South Carolina, Governors Francis Pickens (1860-1862) and Milledge Bonham (1862-1864), during their administrations. The Documents, which date from between December 1860 and August 1864, concern Confederate military reports, correspondence, and telegrams between various Confederate generals, officers, servicemen, and government officials, and related materials. The Documents also address a wide variety of official duties of the Governor during that time period. The parties presented a summary list description of the individual Documents. (Tr. Transcript, Pl. Exhibit 5.) These descriptions are very vague such that the court can not be sure of the exact content of the individual documents. As such, the court acknowledges that the examination of certain specific Documents could lead to differing conclusions as to their nature; however, the parties determined to present their positions as applicable to the Documents as a whole. (B.C. Order at 6.) Accordingly, the court adopts the Bankruptcy Court's finding of fact that the Documents are properly described as Governor's records relating "to matters of military significance, police powers, as well as to other duties of the Governors during the relevant time period." (B.C. Order at 10.)

Appellant found the Documents in a bag in his stepmother's closet after she passed away, sometime during 1999-2000. Appellant had not been aware of the existence of the Documents prior to this time. Appellant eventually sold a few Documents to different individuals and has given two to his wife. In May 2004, Appellant entered into a contract, through his company Haulover Development Corporation, to auction the

remaining Documents. The Documents were previously appraised at approximately $2.4 million. The proposed auctioneer testified at trial and indicated that he had extensively marketed and advertised the auction of the Documents. The auctioneer also testified that he met with Appellee Rodger Stroup, Director of the South Carolina Department of Archives and History (the "Department of Archives") prior to the scheduled auction and that Stroup had sought permission to place the Documents on microfilm prior to sale for historical preservation purposes. Appellant agreed that the Documents could be microfilmed.

One day prior to the auction, Stroup and the Attorney General's Office for the State of South Carolina obtained a restraining order in state court preventing the sale of the Documents. Following the enjoinment of the auction, Appellant filed for bankruptcy protection under Chapter 11 of the United States Code on August 16, 2004. The complaint was thereafter filed in the Bankruptcy Court by the Appellant seeking a declaratory judgment as to his ownership of the Documents.

Appellant is the great-great-nephew of Confederate Major General Evander McIver Law, who served in the Civil War. The Documents, obtained at some point by General Law, passed from Annie Storm, descendant of General Law, to Blanche C. Law, Appellant's great-aunt and sister of his grandmother. Thereafter, Appellant contends that the Documents were passed to his father and then to him. The Documents have been in the possession of Appellant's family for over 140 years.[2] While the exact circumstances under which

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[2] Litigation with respect to any inter-family entitlement to the Documents was bifurcated upon the request of the parties, and any dispute between them is not addressed by this court.

General Law came to possess the Documents are unclear, it is likely that the circumstances were as follows:

In December 1864, recently-elected Governor A.G. Magrath ordered the State Auditor, James Tupper, to prepare the State's records for removal from Columbia in preparation for the imminent attack upon Columbia by General Sherman. A large number of State archives and records were moved out of Columbia on February 16, 1865 and stored in locations in Chester and Spartanburg, South Carolina, presumably to preserve them from destruction. General Law was involved in the evacuation of Columbia in February of 1865, and it is likely that this was the time period during which General Law came into possession of the Documents. There is no evidence that General Law illegally obtained possession of the Documents.

The Documents have previously been made available for sale. On February 16, 1896, General Law himself sent a letter to a book dealer in New York regarding the sale of some of the Documents in question. (Tr. Transcript, Pl. Exhibit 10.) Some of the records of the Pickens and Bonham administration are at the Library of Congress, presumably sold to it from this same New York book dealer. In the late 1940s, the granddaughter of General Law, Annie Storm, corresponded with the University of North Carolina as well as with R .L. Meriweather of the South Caroliniana Library of South Carolina University regarding the possible sale of the Documents. (Tr. Transcript, Pl. Exhibits 11-38.) As a result of the correspondence, no sale was accomplished, but the Documents were placed on microfilm at the Southern Historical Society, University of North Carolina.

There is little information as to where Governor's records of the 1860s, such as the Documents, are kept or have

been kept in the past. (Tr. Transcript, Pl. Exhibit 43.) Such records are spread about and private collectors and the South Carolina Historical Society, a private entity, have played a large role in their preservation. (*Id.*) It is clear, however, that the State does have some items similar to the Documents in their Department of Archives. For example, some official correspondences of other nineteenth-century Governors, similar to those in the Documents, are stored at the Archives. While the State Archives only has records of one antebellum Governor, it has *some* records of every other South Carolina Governor since 1860, with few exceptions.

Bankruptcy Court's Conclusions of Law

In considering an appeal from a bankruptcy court's determination, the district court must review de novo any conclusions of law. *In re Bogdan,* 414 F.3d 507, 510 (4th Cir.2005) ("[W]e review the bankruptcy court's factual findings for clear error, while we review questions of law de novo"); *Loudoun Leasing Dev. Co. v. Ford Motor Credit Co. (In re K & L Lakeland, Inc.),* 128 F.3d 203, 206 (4th Cir.1997) (holding that the "clearly erroneous" standard will not insulate findings "made on the basis of the application of incorrect legal standards").

The Bankruptcy Court concluded that: (1) under the common law, the State bears the burden of proving a superior title to the Documents;[3] (2) the Documents are public records

[3] The Bankruptcy Court correctly concluded that, because possession is prima facie evidence of title to personal property,

of the State of South Carolina; (3) under the common law, public records are the property of the State; and (4) none of the defenses alleged by Appellant preclude the State from asserting its claim to the Documents. Appellants contest conclusions of law 2 and 4. The court therefore reviews these conclusion of law de novo.

1. WERE THE DOCUMENTS CONSIDERED PUBLIC RECORDS WHEN THEY WERE FIRST PRODUCED?

The Bankruptcy Court found that the Documents were public records. This finding, the bedrock upon which the entire opinion relied, is essential to the State's claim of ownership. In reaching this conclusion, the Bankruptcy Court relied upon *State v. Farnum,* 73 S.C. 165, 53 S.E. 83 (S.C.1905). In this case, the South Carolina Supreme Court held that the county dispenser of intoxicating liquors is a state officer, and all books, documents, and letters in the dispensary relate prima facie to the public business; therefore, such records are rightly considered public records. The court reasoned that certain "papers are public documents ... for the reason that they relate either to the rightful discharge of the duties of the office of the defendant or to his violation of the official trust reposed by the state in him." *Id.* at 85. The Bankruptcy Court concluded that the Documents "as a whole appear to relate to the official duties of the public office of the Governor and, for the reasons stated herein, appear to be public records. Plaintiff did not provide sufficient

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Appellant met his initial burden of proof of ownership. *Ex Parte Dort,* 238 S.C. 506, 121 S.E.2d 1 (S.C.1961). The Bankruptcy Court notes that "[t]he burden thus appears to shift to the State to prove superior title. South Carolina common law has established that in order to prove superior title, the challenging party cannot rely solely upon the weakness of the possessor's title." (BC Order at 9.)

evidence that the Documents became personal property on the date of the respective Governor's resignation, departure, or loss of actual possession." (B.C. Order at 18.)

Appellant argues that this line of reasoning is misapplied. *Farnum* was decided over forty years after the Documents were produced. As such, its reasoning is not necessarily applicable to the case at hand. Appellant rightly asserts that if "the State has a viable claim, it must rest on the common law as it existed in 1865 ." (Appeal at 21.)

After a thorough review of the record, the court finds no persuasive evidence to support the State's contention that, prior to 1865, the records of the state executive branch were considered public records. As a South Carolina court in 1848 pronounced, "The public records in the Secretary of State's office do not belong to the Secretary; *they are the property of the State.* He is the mere keeper under her authority. Whatever she wills about them, he is bound to obey."[4] *Pinckney v. Henegan,* 2 Strob. 250, 1848 WL 2877, *2 (S.C.App. Law 1848). The court interprets this informative excerpt to mean that at least those documents *in the care of the Secretary of State* are public records, indisputably the property of the State.[5] There is

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[4] Appellees rely upon this case for the proposition that the Documents, if public records, are the property of the state. While this is undoubtably true, it presupposes that the Documents are in fact public records.

[5]The court does not conclude that *only* those documents in the care of the Secretary of State were public records. The fact that the Documents were not in the care of the Secretary is not conclusive proof that they are not public record; however, contrary to the State's assertion, this case cannot stand for the proposition that they definitely were.

no evidence that the Documents, which date from between 1860 and 1864, were ever in the Secretary of State's office. In December of 1865, the State Legislature passed an Act by which the Executive branch of the State was required to maintain records of its activities. See *An Act to Organize the Executive Department of the State,* Act 4754, Statutes at Large of South Carolina, Vol. XIII, Statutes at Large (rep. Printing 1875). This 1865 statute gave the Secretary of State responsibility to "as soon as practicable, collect, deposit and keep in Columbia all the books, records and papers belonging thereto [the Executive Chamber]." Following this Act, it is reasonable to conclude that Executive records, now in the possession of the Secretary, were considered public records. However, the State has presented no evidence, that, prior to this Act, the Secretary of State had any control over documents produced by the Executive branch. The wording of the statute, indicating that the Secretary should begin this duty "as soon as practicable," further leads the court to believe that such a duty was not imposed prior to this date. As such, the 1865 statute, read in conjunction with the 1848 case, undermines rather than supports the State's assertion that Governor's records were public records prior to 1865.

Sternberger v. McSween, a South Carolina case from 1880, further supports Appellant's contention that the Documents are not public records. As was described by this South Carolina court regarding the import of filing a notice of a lien,

> "When papers are placed on file in a public office, they become public records, open to the inspection of the public, under proper regulations; but if private individuals are at liberty to remove them whenever they see fit, they necessarily lose their character as public

> records. They are in the custody of the officer in whose office they are filed, and he is responsible for them. If he chooses to allow individuals to remove the originals rather than to require them to procure copies, that is a matter of mere favor and not of right, and while we may not feel called upon to volunteer a condemnation of such a practice, we certainly cannot be expected to give it judicial sanction. As is said in 1 *Bouv. Law Dict.* 524: 'A paper is said to be filed when it is delivered to the proper officer and by him received *to be kept on file.*' "

Sternberger v. McSween, 14 S.C. 35, 39 (S.C.1880). Under this definition, the Documents are necessarily not public records because they are not, and no evidence proves that they ever were, "on file in a public office."[6] *Id.*

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[6] While irrelevant to the case at hand, the court notes that the modern definition of "public record" continues to be unhelpful to the State's case. According to the Public Records Act, 1962 Code of Law, " 'Public record' includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, *owned, used, in the possession of, or retained by a public body.*" Freedom of Information Act, S.C. ST § 30-4- 20(c). The court does not adopt the circular logic that the Documents are not public records because they are not in the possession of a public body; however, the court does opine that this statute, upon which the Bankruptcy Court relied in rendering its opinion, does not offer any support to the contention that the Documents are public records. Further, the court notes that, even if documents of a similar nature to the Documents were public records, the State has offered no evidence that these actual Documents were ever so considered.

The court is therefore persuaded that the State has failed to prove that the Documents were public records when they were produced. The State's interest in them now does not retroactively make them so. While the court understands and sympathizes with the States admirable desire to preserve and make accessible documents relevant to South Carolina history, such an interest cannot supercede an individual's rights in his personal property. The State, as well as any other private collector, may obtain these Documents by purchasing them from Appellant for a competitive price.

The court also notes that the ruling of the Bankruptcy Court, if upheld, would set a dangerous and disruptive precedent. As Appellee's own expert testified, the Documents are similar in scope and type to collections of South Carolina papers held by both the Library of Congress and Duke University. (Tr. Vol.II, p. 30.) The form of docketing and the type of information contained in these collections are very similar to those found in the Documents. (*Id.*) These collections at the Library of Congress and at Duke were purchased from private collectors. (*Id.*) To assert that such documents are truly and properly the property of South Carolina would fly in the face of well-settled and unchallenged archival practices. While the Bankruptcy Court is careful to note that "the nature and ownership of those documents are not before the Court," a ruling that the State is the owner of the Documents is sure to throw into question the ownership of similar documents. (B.C. Order at 24.)

Given that the State has neither introduced a statute or case law that establishes that Governor's records were matters of public record prior to 1865, nor has the State presented sufficient evidence that these particular Documents were ever

in the possession of the Secretary of State, the court cannot find that it has met its burden to prove superior title to the Documents. The later statutes and case law upon which the Bankruptcy Court relied are misleading and inapplicable to the determination of ownership. Regardless of whether the State came to regard Executive papers as public records at some point following the creation of the Documents, the State presents no evidence that proves that these Documents were so considered at the time. The fact that several private archives are now in possession of similar Executive Branch documents is good evidence that such papers were not valued and preserved by the State at the relevant times. Accordingly, the court rules that, because they are not public records, the State has no claim of ownership of these Documents. Title to the Documents therefore properly resides with Appellant, Mr. Thomas Law Willcox.[7]

2. DOES APPELLANT HAVE A DEFENSE TO THE STATE'S CLAIMS?

Appellant argues that the Bankruptcy Court erred in finding that he had no viable defenses to the State's claim. On appeal, Appellant asserts that the defenses of statute of limitations, staleness, waiver, estoppel, and laches were wrongfully denied. The court address each of these defenses in turn.

a. Statute of Limitations

Appellant argued before the Bankruptcy Court that the

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[7] This ruling has no bearing on any possible suits regarding ownership as among the members of the Willcox/Patterson family.

State should be barred by the statute of limitations from asserting its claim to the Documents. In support of this contention, Appellant presented evidence that the State, through Dr. Meriwether, an employee of the South Caroliniana Library, a branch of the University of South Carolina, had actual knowledge of the Law family's possession of the Documents as early as 1947. Dr. Meriwether and Mrs. Annie Storm carried on substantial correspondence in and around 1947 concerning the Library's possible acquisition of the Documents. The Appellant presented further evidence that the applicable statute of limitations in the 1940s was six years. As such, Appellant reasoned that the State's failure to act upon its claim of ownership prior to 1954 precludes it from asserting the present action.

The Bankruptcy Court found that Dr. Meriwether was acting within his capacity as an employee of the Library when he corresponded with Mrs. Storm regarding the Documents in 1947; however, the Court also found that Dr. Meriwether's knowledge did not commence tolling of the statute of limitations as against the State because, in 1947, the Historical Commission of South Carolina, not the South Caroliniana Library, had the care and custody, by statute, of all the official archives of the State of South Carolina. As such, the Bankruptcy Court concluded that only actual knowledge of an employee of the Historical Commission could be imputed to the State. Appellant argues that such a conclusion is in error.

The court now finds that the Bankruptcy Court did so err. The determination under the discovery rule for a statute of limitations is objective, rather than subjective; as such, the question is not whether the particular plaintiff *actually* knew she had a claim, but is whether the circumstances of the case would put a plaintiff of common knowledge and experience on notice that some right of hers has been invaded or that some

claim against another party might exist. *Martin v. Companion Healthcare Corp.*, 357 S.C. 570, 593 S.E.2d 624, 2004 WL 368947 (S.C.Ct.App.2004); *Walsh v. Woods*, 358 S.C. 259, 594 S.E.2d 548, 2003 WL 23329189 (S.C.Ct.App.2004) ("To determine whether statute of limitations has run, court does not consider whether particular plaintiff in case before court knew he or she had a claim, but rather whether circumstances of case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist."). As such, under South Carolina law, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. *Rumpf v. Massachusetts Mut. Life Ins. Co.*, 357 S.C. 386, 593 S.E.2d 183, 2004 WL 188085 (S.C.Ct.App.2004).

With regard to when the State "ought to have discovered" it had a cause of action, the court finds instructive a case which comes from the United States Court of Appeals for the Second Circuit, interpreting a New York statute of limitations for the recovery of personal property, which like South Carolina law, has a due diligence requirement for the plaintiff.[8] The New York law interpreted in *DeWeerth v. Baldinger*, 836 F.2d 103 (2nd Cir.1987), provided a three-year statute of limitations for the recovery of personal property, running from the time demand is first made on the good faith purchaser. Demand cannot, however, be unreasonably delayed. Even where the true owner does not know where the property is, his obligation not to unreasonably delay demand includes an obligation to make a reasonable effort to locate the property. *Id.* In *DeWeerth*, the German owner of a painting stolen from her

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[8] This Second Circuit case, while not binding precedent on the court, was cited with approval by the Federal District Court of South Carolina in *Baskin v. Seajay Society, Inc.*, 1997 WL 910371, *6 (D.S.C.1997).

by occupying troops in World War II in 1945, had no idea where the property was. Despite the fact that she (i) contacted authorities, (ii) filed a report with the military government in 1946, (iii) sought legal advice in 1948, (iv) contacted an art expert to investigate in 1955, (v) notified the West German federal bureau of investigation in 1957, (vi) found mention of the painting as having been sold by a New York art dealer, such mention being found in 1981 in a catalogue of the painter's work published in 1974, such catalogue being located in a museum, (vii) retained counsel immediately thereafter in 1982, (viii) sued the art dealer in 1982 to learn the identity of the good faith purchaser, (ix) made immediate demand on the good faith purchaser in 1982 as soon as she discovered her name, and (x) brought suit in 1983 immediately after demand was rejected, the original owner's claim was time barred because she had not exercised "reasonable diligence" to locate the property. *Id.* She had a whole world to search, did search, and was still time-barred.

With this case in mind, the court has no difficulty in finding that the State, with minimal inquiry, ought to have discovered this alleged injury many years prior to the instant case. In 1896, General Law organized the sale of certain South Carolina documents to a New York book dealer. Presumably, these are the documents that eventually landed in the Library of Congress. At that time, he openly acted as a rightful and lawful owner of the Documents, and exercised unfettered rights of ownership, including the right to sell them. In 1947, Mrs. Storm wrote to Dr. Meriwether, an employee of the State, that "[f]or some years I have tried to get into direct contact with someone in South Carolina who could tell me how such papers could or would be preserved within the State ... but so far I have been unable to get any such assurances from anyone in South Carolina." She further asserted that her "valuable collection of South Carolina papers" included "actual State House papers-the

originals." (Tr. Transcript, Pl. Exhibit 35.) The State made no claim of ownership at that time. Dr. Meriwether, upon hearing that the collection included "State House papers" certainly never made any such claim, but rather, acting upon the assumption that Mrs. Storm was the rightful owner, asked that she give the papers to the Library as a gift, or, if necessary, the Library would "undertake the purchase." (Tr. Transcript, Pl. Exhibit 37.) At no time did General Law or Mrs. Storm act in a furtive, or clandestine manner in arranging these sales. To the contrary, these sales were conducted in an open manner, with Mrs. Storm even contacting employees of the State regarding the possible sale. Further, microfilm versions of the Documents have been accessible to the public at the University of North Carolina since the 1940s, and originals from General Law's collection have been at the Library of Congress since before the turn of the century. Surely, if the State were interested, it would have investigated the source of the documents in either the Library of Congress or at the University of North Carolina. Even a cursory investigation would have led the State to the Documents, which have been in the undisturbed possession of the Law/Willcox family for five generations. Unlike the obstacles faced by the German plaintiff in the *DeWeerth* case, the State had the Documents within its boundaries and openly possessed by one of its citizens for over 140 years and yet, had Appellant not informed the State of the impending sale, the State would *still* not know of the Documents' location. Such inaction cannot be said to be the exercise of reasonable diligence in locating its alleged missing property.

In this case, even if Dr. Meriwether's knowledge of the Documents cannot be considered to impute *actual* knowledge to the State, the Law family's open and unabashed possession and exercise of ownership over the Documents was such that, upon minimal and reasonable inquiry, the State should have known of them. The State has therefore failed to satisfy its duty

to make a reasonable effort to locate the property. As such, the court finds that the State is barred by the statute of limitations from asserting any claim of ownership as to these Documents.

b. Staleness

Under South Carolina law, a stale demand is "one that has for a long time remained unasserted; one that is first asserted after an *unexplained delay* of such great length as to render it difficult or *impossible for the court to ascertain the truth of the matters in controversy* and to do justice between the parties, or as to create a presumption against the existence or validity of the claim, or a presumption that it has been abandoned or satisfied." *Prebyterian Church v. Pendarvis,* 227 S.C. 50, 86 S.E.2d 740, 744 (quoting *Bell v. Mackey,* 191 S.C. 105, 123, 3 S.E.2d 816, 824 (1939)). The Bankruptcy Court found that, because the State could not be said to have had actual knowledge of the Documents, any delay in bringing this case is excused and the claim is therefore not barred by staleness. The court disagrees.

In this case, the Law/Willcox family has been in open and obvious possession of the Documents for over 140 years. As discussed above, upon minimal investigation of the source of the documents in either the Library of Congress or the University of North Carolina, the State would have been led to the Documents. The State has not explained its failure to do so and earlier bring suit. This unexplained delay has undoubtably resulted in the court's inability to "ascertain the truth of the matters in controversy." *Id.; see also All Saints Parish, Waccamaw v. Protestant Episcopal Church in the Diocese of South Carolina,* 358 S.C. 209, 595 S.E.2d 253, 268-269 (S.C.Ct.App.2004); *Presbyterian Church of James Island v. Pendarvis,* 227 S.C. 50, 86 S.E.2d 740 (S.C.1955). At this late

date, every person who had actual knowledge of how the Documents were held prior to coming into the possession of General Law or had some knowledge of how General Law came into such possession is dead. The court must therefore speculate as to the origin of the Documents, how they came to be in the possession of General Law, and whether they were ever meant to be public in nature. The passage of time, as well as the ravages of Civil War and Reconstruction, have made it all but impossible to ascertain the true nature of the facts necessary to support the State's claim. Accordingly, in the interests of justice, the court finds that staleness bars the State's claim of ownership.

c. Laches, Abandonment, and Waiver

Under South Carolina law, the defenses of laches, abandonment and waiver all require a showing that the claimant had actual knowledge of his rights and then made some affirmative repudiation of those rights. To prove laches, a party must establish: "(1) delay, (2) unreasonable delay, [and] (3) prejudice." *Hallums v. Hallums,* 296 S.C. 195, 371 S.E.2d 525, 528 (S.C.1988); *see Arceneaux v. Arrington,* 284 S.C. 500, 327 S.E.2d 357, 358 (S.C.Ct.App.1985). In addition, "the circumstances must ... [be] such as to import that the complainant had abandoned or surrendered the claim or right which he now asserts." *Byars v. Cherokee County,* 237 S.C. 548, 118 S.E.2d 324, 330 (S.C.1961); *see Pendarvis,* 86 S.E.2d at 744. In order to abandon a right, "there must be some clear and unmistakable affirmative act or series of acts indicating a purpose to repudiate ownership." *Witt v. Poole,* 182 S.C. 110, 188 S.E. 496, 498 (S.C.1938). Similarly, waiver is defined as a "simple voluntary relinquishment of a right with knowledge of all the facts." *City of North Myrtle Beach v. Lewis-Davis,* 360 S.C. 225, 599 S.E.2d 462, 466 (S.C.Ct.App.2004).

The court finds that the Bankruptcy Court correctly denied Appellant's defenses of laches, abandonment and waiver. While the court finds that, objectively, the State could have and should have known of the Appellant's possession of the contested Documents, the Appellant has failed to make an adequate showing that the State had such actual knowledge.

CONCLUSION

The court hereby finds that the Bankruptcy Court erred in finding that the Documents are public records and in denying Appellant's statute of limitations and staleness defenses. It is therefore ORDERED, for the foregoing reasons, that the judgment of the Bankruptcy Court is REVERSED; and it is further

ORDERED that the State has not met its burden of proving superior title to the Documents; and it is further

ORDERED that the State is barred from asserting an ownership interest in the Documents due to the running of the statute of limitations and staleness; and it is further

ORDERED that the Documents are therefore the property of the Appellant Thomas Law Wilcox; and it is further

ORDERED that this ruling has no effect on the claims of the Willcox and Patterson Defendants, which may be brought at any time; and it is further

ORDERED that the Appellant's Motion to Stay execution of

the judgment of the Bankruptcy Court is hereby rendered moot.

AND IT IS SO ORDERED.

/s/

PATRICK MICHAEL DUFFY
United States District Court Judge

Charleston, South Carolina
January 12, 2006

APPENDIX IV

United States Bankruptcy Court,

D. South Carolina.

In re Thomas Law WILLCOX, Debtor.

Thomas Law Willcox, Plaintiff,

v.

Rodger Stroup, Director, South Carolina Department of Archive and History;

State of South Carolina ex rel. Henry McMaster, Attorney General for the State

of South Carolina; John M. Willcox, and Kathryn Willcox Patterson, Defendants.

Bankruptcy No. C/A 04-09605-W.

Adversary No. 04-80337-W.

Aug. 15, 2005.

ORDER

JOHN E. WAITES, Bankruptcy Judge.

This matter comes before this Court for trial in the above-captioned adversary proceeding pursuant to a complaint (the "Complaint") filed by Thomas Law Willcox (the "Debtor" or "Plaintiff") against the Defendants State of South Carolina ex rel. Henry McMaster, Attorney General and Rodger Stroup, Director, South Carolina Department of Archives and History (collectively, the "State" or "Defendants"). The Defendants John M. Willcox and Kathryn Willcox Patterson filed a counterclaim asserting ownership rights. By Order entered

March 3, 2005, the claims raised by John M. Willcox and Kathryn Patterson were bifurcated upon the request of the parties.[1] Also before the Court is the State's Motion for Certification of Questions of Law to the State Supreme Court. Based upon the trial of this matter, the evidence presented, the arguments of counsel and the applicable law, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Federal Rule of Civil Procedure 52, which is applicable in bankruptcy proceedings pursuant to Federal Rule of Bankruptcy Procedure 7052.[2]

FINDINGS OF FACT

1. Plaintiff/Debtor Willcox possesses approximately 444 documents (the "Documents") consisting of documents concerning two former Governors of South Carolina, Governors Francis Pickens (1860-1862) and Milledge Bonham (1862-1864) during their administrations.

2. It is undisputed that the Documents concern Confederate military reports, correspondence and telegrams between various Confederate generals, officers, servicemen, and government officials, and related materials. The Documents also address a wide variety of official duties of the Governor

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[1] In the March 3, 2005 Consent Order, counsel for Plaintiff and counsel for Defendants Willcox and Patterson indicated that if the State were to prevail, the Willcox and Patterson Defendants' claims would be moot.

[2] The Court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

during that time period. Plaintiff found the Documents in a bag in his stepmother's closet after she had passed away, sometime during 1999-2000. Plaintiff testified that he had not been aware of the existence of the Documents prior to this time.

3. Plaintiff eventually sold a few of the Documents to different individuals and has given two (2) to his wife. In May 2004, Plaintiff entered into a contract, through his company Haulover Development Corporation, to auction the remaining Documents.[3] The Documents had been previously appraised at approximately $2.4 million.

4. The proposed auctioneer testified at trial and indicated that he had extensively marketed and advertised the auction of the Documents. The auctioneer also testified that he met with Defendant Rodger Stroup, Director of the South Carolina Department of Archives and History (the "Department of Archives") prior to the scheduled auction and that Stroup sought permission to place the Documents on microfilm prior to sale for historical preservation purposes. While there was some dispute about the content of the parties' conversation,[4] there is no dispute that Plaintiff agreed following that conversation that the Documents could be microfilmed.

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[3] Plaintiff indicated that he used the company name for reasons of privacy and to effectively order his business affairs.

[4] The auctioneer testified that he was told by Stroup that the Department of Archives was not interested in the Documents. Stroup testified that at the time of his discussion with the auctioneer, he had not yet reviewed the Documents and was not certain whether the State had a claim to them at that time. Plaintiff alleges that Stroup acted with unclean hands when he told the auctioneer the Department of Archives was not interested in the Documents and that the claims of the State should thus be deemed waived, estopped, or barred, as will be further developed herein.

5. One day prior to the auction of the Documents, scheduled for August 7, 2004, Stroup and the Attorney General's Office for the State of South Carolina obtained a restraining order in state court preventing the sale of the Documents.

6. Plaintiff testified that he was seeking to auction the Documents due to serious personal and financial strains. Following the enjoinment of the auction, Plaintiff filed for bankruptcy protection under Chapter 11 of the United States Code on August 16, 2004. The Complaint was thereafter filed and this adversary proceeding commenced.

7. Neither the State nor Plaintiff presented definitive evidence to explain how the Documents came into the possession of Plaintiff's ancestors, although certain evidence related thereto was presented as follows.[5]

8. Plaintiff is the great-great-nephew of Confederate Major General Evander McIver Law who served in the Civil War. Plaintiff asserts that General Law was involved in the evacuation of Columbia in February of 1865, and that this was the time period during which General Law came into possession of the Documents. The parties do not dispute that in December, 1864, recently-elected Governor A.G. Magrath ordered the State Auditor, James Tupper, to prepare the State's records for removal from Columbia in preparation for the imminent attack upon Columbia by General Sherman. A large number of State archives and records were moved out of Columbia on February 16, 1865 and stored in locations in Chester and Spartanburg, South Carolina, presumably to preserve them from destruction. Thereafter, efforts were made on behalf of the State to return

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[5] It is undisputed that there is no evidence that General Law illegally obtained possession of the Documents.

State records to Columbia.[6]

9. Plaintiff asserts that the papers came into possession of the Willcox and Law families from General Law by being given to Blanche C. Law (Plaintiff's great-aunt and sister of his grandmother) by General Law's descendant, Annie J. Storm. Thereafter, Plaintiff contends the papers were passed to his father and then to Plaintiff.[7]

10. Both parties agree that a February 16, 1896 letter from General Law to a book dealer in New York may concern some of the Documents in question. Some of the records of the Pickens and Bonham administration are at the Library of Congress, allegedly sold to it from this same New York book dealer. Whether the documents in General Law's possession are in fact part of these same referenced documents at the Library of Congress is not certain.

11. At trial, testimony was presented by Plaintiff and an

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[6] Many of the exhibits presented by both parties concerning the removal of the papers and the return of papers following the Civil War are unreadable copies. It is the Court's understanding that the exhibits presented are the best versions available, and the Court does not believe its decision has been hindered by the quality of these exhibits.

[7] As previously noted, litigation with respect to any inter-family entitlement to the Documents was bifurcated based upon the request of the parties and any dispute between them is not addressed herein.

expert witness on behalf of Plaintiff.[8] Plaintiff's expert witness testified that historically, the State has been inactive in securing its records and that, until the creation of the Historical Commission of South Carolina in 1905, there were largely no efforts to preserve public records. He also testified that there is little information as to where Governor's records are kept or have been kept in the past, but that such records are spread about and that private collectors and the South Carolina Historical Society have played a large role in their preservation.

12. Expert witness testimony was also presented by the State by two archivists from the Department of Archives and by Stroup. The archivists testified that the Documents are similar in nature to other documents housed at the Department of Archives from the Pickens and Bonham administrations, and have markings on them consistent with the docketing systems used on those same documents for the purpose of organizing the retention and retrieval of the documents. The State presented testimony that this docketing system includes tri-folding the document, with a notation on the back showing to whom the final version of the documents was sent. The State also indicated that incoming correspondence was similarly docketed and may additionally include notations about actions taken in relation thereto. The State also presented testimony that the Documents are similar to correspondence of other Governors stored at the Department of Archives. Testimony was further presented by the State that these Documents are consistent with what would be considered by the Department of Archives as a public record that would be accessioned into its collection. Finally, the State presented testimony that, while it only has records of one antebellum Governor, it has some records of every other South Carolina Governor since 1860, with few exceptions.

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[8] The auctioneer also testified on behalf of Plaintiff as to the events leading up to the auction date and the injunction.

12. Evidence was also presented by both parties that the Documents in this case have been on microfilm at the Southern Historical Society, University of North Carolina, Chapel Hill, since the late 1940's. Plaintiff presented evidence in the form of correspondence between General Law's granddaughter, Annie Storm, and the University of North Carolina as well as with R.L. Meriwether, who was affiliated with the South Caroliniana Library and apparently to some extent with the University South Caroliniana Society. The correspondence concerns Ms. Storm's efforts to sell the Documents to either the Southern Historical Society or the South Caroliniana Library. As a result of these communications, the Documents were placed on microfilm at the Southern Historical Society, University of North Carolina. In the correspondence, Ms. Storm refers to the papers as original South Carolina State House papers entrusted to General Law. Plaintiff asserts that the correspondence evinces that the State of South Carolina knew of the existence of the collection of Documents since 1948 and that Meriwether was a State employee and Secretary of the South Caroliniana Library, which is part of the University of South Carolina. The State asserts that Meriwether was acting on behalf of the South Caroliniana Society rather than as a public employee.

13. The parties presented a summary list description of the Documents.[9] There was no convincing evidence from either

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[9] The parties chose to submit the summary list rather than the individual Documents into evidence, such that the Court is to rely on the descriptions contained therein, and this ruling is to apply to all Documents collectively. The State asserts that the summary mistakenly identifies some of the documents as "ALS" meaning "autograph letter signed." an outgoing letter signed by the author, but that some of those Documents are retained drafts. Otherwise, the parties do not appear to dispute the descriptions provided. The

party as to the exact history of the Documents and precisely how they came into Plaintiff's family's possession. Nevertheless, the parties seek a determination of issues concerning the nature of the Documents, ownership thereof, and other defenses despite this lapse in history.

CONCLUSIONS OF LAW

I. PROCEDURAL POSTURE AND BURDENS OF PROOF

The Complaint seeks declaratory relief and a determination that the Documents are property of the bankruptcy estate. It has been recognized that the burden of proof as to what is property of the estate generally lies with the creditor. *In re Altman,* 230 B.R. 6, 11 (Bankr.D.Conn.1999), *vacated in part on other grounds,* 254 B.R. 509 (D.Conn.2000), *In re Datesman,* No. 98-30369, 1999 WL 608856, at *2 (Bankr.E.D.Pa. Aug.9, 1999). Nevertheless, in this case, Debtor/Plaintiff filed the Complaint seeking such determination, and the burden of proof in declaratory judgment actions lies, as a general principle of law, with the moving party who is held to "have assumed the risk of nonpersuasion." 10B Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE § 2770 (Civil 3d 1998). *See also Weller v. Texas Guaranteed Student Loan Corp. (In re Weller),* 316 B.R. 708, 711 (Bankr.W.D.Mo.2004) (party seeking declaratory judgment bears burden of proof); *Air Vectors Assoc. v. New York State Dep't of Trans. (In re Air Vectors Assoc.),* 53 B.R. 668, 685 (Bankr.S.D.N.Y.1985) (plaintiff in declaratory judgment action must sustain the burden of proof and bear the risk of

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stipulation of the parties restricts the Court's review of the actual Documents and limits the Court to the evidence provided by the parties in relation to the Documents.

nonpersuasion of prima facie case). Although Plaintiff did not specify whether he is relying upon the federal Declaratory Judgments Act, 28 U.S.C. § 2201, which grants federal courts the authority to hear declaratory judgment cases, *See United Capitol Ins. Co. v. Kapiloff,* 155 F.3d 488, 493 (4th Cir.1998), or the South Carolina Declaratory Judgment Act, the party bearing the burden of proof appears to be the moving party in either case.[10]

In the Fourth Circuit, it has been determined that "[w]hen state law provides the rule for decision in a suit for declaratory judgment in federal court, whether or not the burden of proof should be shifted [from the applicable burden] is determined according to the rule in the forum state for similar declaratory actions." *Farnsworth Cannon, Inc. v. Grimes,* 635 F.2d 268, 273 (4th Cir.1980) (citations omitted). *See also Taylor v. Magnolia Manor-Spartanburg (In re Taylor),* C/A No. 94-73715, Adv. Pro. No. 94-8202, slip op. at 9 (Bankr.D.S.C. May 26, 1995) (applying South Carolina law on burden of proof in action seeking declaratory judgment on

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[10] The lack of explicitness on the part of Plaintiff does not appear deficient. It is has been recognized that bankruptcy courts have the authority to issue declaratory judgments if the matter involves administration of the bankruptcy estate, which appears to be met in this case. *In re Weller,* 316 B.R. at 711. No issue was raised by the parties with respect to the Court's authority to issue a declaratory judgment. *See Katz v. Wagner (In re Metiom, Inc.),* No. 01-12840, 2002 WL 433588, at *1 (S.D.N.Y. Feb. 25, 2002) ("The Bankruptcy Court is a 'Court of the United States' and has power to hear declaratory matters pursuant to 28 U.S.C. § 2201-2202."). Furthermore, the bankruptcy court clearly has jurisdiction to determine what is property of the estate. *PBGC v. Continental Airlines, Inc. (In re Continental Airlines),* 138 B.R. 442, 445 (D.Del.1992).

validity of contracts and amount to be paid thereunder). In *Vermont Mutual Insurance Co. v. Singleton,* the South Carolina Supreme Court addressed the burden of proof under the South Carolina Declaratory Judgment Act and held that:

> Where an action is filed for declaratory judgment seeking affirmative relief, the movant must prove his material allegations by a preponderance of the evidence.

316 S.C. 5, 10, 446 S.E.2d 417, 421 (S.C.1994) (citing *Martin v. Cantrell,* 225 S.C. 140, 81 S.E.2d 37 (1954)) (burden is on plaintiff to prove material allegations of the complaint). Accordingly, under either analysis, Plaintiff must sustain the burden of proof and bear the risk of nonpersuasion of his prima facie case.

The determination of property rights in bankruptcy is controlled by state law, absent a countervailing federal interest. *American Bankers Ins. Co. v. Maness,* 101 F.3d 358, 363 (4th Cir.1996) ("Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.") (citing *Butner v. United States,* 440 U.S. 48, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979)).

In examining state law with respect to ownership of personal property, Plaintiff's initial burden appears met pursuant to South Carolina law. The common law provides that ownership of personalty is presumed from possession. *Nesbitt v. Lewis,* 335 S.C. 441, 447, 517 S.E.2d 11, 14 (S.C.Ct.App.1999). *See also Wheeler v. Wheeler,* 111 S.C. 87,

96 S.E. 714 (1918); *Thompson v. Chapman,* 107 S.C. 461, 93 S.E. 142 (1917). Therefore, the party out of possession has the burden of proof as to ownership. *Hammond v. Halsey,* 287 S.C. 46, 49, 336 S.E.2d 495, 497 (S.C.Ct.App.1985). [11]

Ownership of the Documents appears to be the ultimate issue to be decided in this case. There is no dispute that Plaintiff has possession of the Documents, and that they appear to have been in the possession of his family since the conclusion of the Civil War. Since possession is prima facie evidence of title to personal property, Plaintiff has met his initial burden of proof. *Ex Parte Dort,* 238 S.C. 506, 121 S.E.2d 1 (1961); *Elliott v. Wilson,* 181 S.C. 406, 187 S.E. 825 (1936); *Wheeler,* 96 S.E. at 716; *Thompson,* 93 S.E. at 143.

The burden thus appears to shift to the State to prove superior title. South Carolina common law has established that in order to prove superior title, the challenging party cannot solely rely upon the weakness of the possessor's title. Accordingly, the State must prove the strength of its own title independent of any weakness of Plaintiff's title. *Hammond,* 287 S.C. at 49, 336 S.E.2d at 497 (trustee of decedent estate had to

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[11] The State contends that this rule does not apply to the instant matter because Plaintiff is on notice that the Documents are government property in that they are addressed to or by government officials. While the Documents plainly address military and other government matters on their face, as will be further discussed hereinafter, and are addressed to or by government officials, the State did not present any binding or persuasive authority that would appear to override the rule recognized and applied in South Carolina with respect to the burdens of proof on issues concerning ownership of personal property.

prove title remained with decedent based upon strength of his own title rather than weakness of defendant's).

II. THE DOCUMENTS

The Documents relate to matters of military significance, police powers, as well as to other duties of the Governors during the relevant time period. The State argues that the Documents are property of the State based upon the common law, prior legislative acts, and current statutory authority pursuant to S.C. CODE ANN. §§ 30-1-10(A) and 30-4-20(c) (Law. Co-op.1991 rev. & West Supp.2004) (references to the State's arguments concerning §§ 30-1-10 et seq. shall be to the "State Records Act"). The State asserts that the Documents are public records and thus cannot be considered property of the estate. Plaintiff contends that the State cannot meet its burden of proving superior title based upon either the common law or the State Records Act, and that even if the State did prove their entitlement to the Documents, other legal theories and defenses bar the State's claims. In support of its argument, Plaintiff asserts that Governor's records were and are private property, and that historically the State of South Carolina has had few record keeping requirements.

A. Statutory Authority and the Nature of the Documents

The State argues that dating back as far as 1719, the State has maintained requirements for record keeping, and that examination of these requirements lend support to the State's position that the Documents at issue are public records that belong to the State. Plaintiff presented testimony to the effect that historically, there were largely no efforts on the part of the State to preserve public records. Further, Plaintiff asserts that

an examination of statutory or common law does not support the State's assertion that the Documents are public records. In order to address each parties' argument, an examination of historical statutes that reference record keeping and delineate the role of South Carolina Governors is instructive.

The statutes in place during the time periods for which the Documents were created contemplate an extensive public role on behalf of the Governor with broad duties. These include the following. As early as 1719, a Colonial statute provided, in part, that "... nothing is more necessary for the well-being of a Colony than the preservation of the publick [sic] records ...." Act No. 406, AN ACT FOR PREVENTING THE EMBEZELMENT OF THE PUBLICK RECORDS OF THIS SETTLEMENT, AND FOR OBTAINING THE SAME OUT OF THE HANDS OF SUCH PERSONS AS NOW HAVE THE CUSTODY THEREOF, 1719, Vol. 3, Statutes at Large (Cooper 1838). The Act addressed the situation wherein persons had "made away" with or concealed a number of different records. This Act provided for the recovery of a penalty from those who did not return the records within a specified period of time, and provided for a reward for those who discovered concealed records.[12] The Act further references its enactment by the Governor. *Id.*

Furthermore, in 1789, South Carolina determined to move certain public records to Columbia. This removal process specifically referenced the Governor's involvement in procuring the preservation and removal of public records:

All such State papers, necessary at the meeting

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[12] The Act was later repealed, but appears to have still been in effect in 1838, the date of the printing of the 1838 Statutes at Large.

> of the Legislature, as shall be directed by *the Governor* and Council to be removed, and such records as shall be separate or copied at the time of the removal of the seat of Government to Columbia, shall be removed thereto as is directed . . . .

Act No. 1448, AN ACT FOR THE REMOVAL OF THE PUBLIC RECORDS OUT OF CHARLESTON, AND FOR OTHER PURPOSES THEREIN MENTIONED, 1789, Vol. 5, Statutes at Large (Cooper 1839) (emphasis added). The 1790 Constitution, Article II, provided that:

> Sec. 11. All officers in the executive department, when required by the Governor, shall give him the information in writing, upon any subject relating to the duties of their respective offices.
>
> Sec. 12. The Governor shall, from time to time, give to the general assembly information of the condition of the state, and recommend to their consideration such measures as he shall judge necessary or expedient.

S.C. Const. §§ 11-12 (1790). These responsibilities of a Governor at that time would appear to generate records as to public business, and, consistent with such assertion, for many years annual appropriations provided for a "Private Secretary" and a "Messenger" for the Governor. *See, e.g.*, Act No. 2886, 1843, Vol. XI, Statutes at Large (Rep. Printing 1873); Act. No. 4567, 1861, Vol. XIII, Statutes at Large (Rep. Printing 1875); Act No. 4700, 1864, Vol. XIII, Statutes at Large (Rep. Printing

1875). Furthermore, these statutes provided for the Governor to account to the legislature annually for the appropriations to his Office.

In 1861, the duties and reporting requirements of the Governor increased to an even greater extent. The Governor had been given considerable authority over an armed military force under Act 4498, 1861, Statutes at Large, Vol. XII, Part II, 1850--1861. The Governor was authorized to call into service armed forces, organize new military companies, appoint officers, and generally perform a wide spectrum of military related duties. *Id.*

In addition, the Constitution of the State of South Carolina dated April 8, 1861 set forth the authority of the executive department, which was specifically stated to be vested in the Governor. *See* Constitution of the State of South Carolina, with the Constitution of the Provisional Government and of the Confederate States of America: Electronic Edition. South Carolina, Art. II § 1, Convention (1860--1862), *at http:// www.docsouth.unc.edu/ southcar/south.html* (First edition, 1999, University of North Carolina at Chapel Hill). The Governor's duties included commanding the armies and serving as the Commander-in-Chief of the army and navy, granting reprieves and pardons, taking care that the laws were faithfully executed, and prohibiting the exportation of provisions. *Id.* at sections 6 through 9. The Constitution of 1861 also provided that all officers in the Executive Department, when required by the Governor, were to give him information, *in writing,* upon any subject relating to the duties of their respective offices. *Id.* At section 11 (emphasis added). Furthermore, the Governor was directed to give to the General Assembly of the state information on the state's condition, and recommend to their consideration such measures as he shall judge necessary or expedient. *Id.* at sections 12 and 13. Finally, he was given the

power to convene the General Assembly, and, in cases of disagreement between the two houses concerning adjournment, adjourn the General Assembly. *Id.*

In many instances, the statutes during 1860-1864, the same period for which the Documents cover, reference Governor duties and mirror those set forth in the Documents.[13] A review of the summary of 444 Documents reveals that a large portion of these Documents relate directly or tangentially to the Governor's broad military duties. These include information relating to military supplies and shortages, military preparations, the strength and condition of the military, documentation of troop movement, accounts and reports on results of certain battles, and use of funds for military purposes. *See* Defendants' Exhibit 3, List of 444 Documents (the "Summary List").

Several other provisions enacted during the relevant time periods are also reflected in the Documents. For example, in 1861, the Governor was authorized and required to issue bonds or stock in the name of the State to continue the construction of the new State House. Act No. 4530, AN ACT TO AUTHORIZE THE ISSUE OF BONDS OF STOCK FOR CONTINUING THE CONSTRUCTION OF THE NEW STATE HOUSE, 1861, Vol. XIII, Statutes at Large (Rep. Printing 1875). The Governor was authorized by this statute to suspend the prosecution of said work, for the reasons provided therein. One of the Documents dated June 7, 1861, from Governor Pickens to the President of the Bank of South Carolina, specifically concerns work on the State House and the

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[13] While some of these provisions were later repealed, they collectively represent the broad duties of the Governor at the time.

sale of State stock. Summary List, June 7, 1861 (Document Number 58).

The Governor also had additional defense and police powers. In 1861, the Governor was charged with establishing an efficient police for the coasts and inlets of the State, including procurement of three vessels armed with weapons. The vessels were to be under the control of the Governor, and the Governor was to account to the Legislature for the amount appropriations drawn to accomplish the establishment. ACT NO. 4555, AN ACT FOR THE ESTABLISHMENT OF A COAST POLICE FOR THE STATE OF SOUTH CAROLINA, 1861, Vol. XIII, Statutes at Large (Rep. Printing 1875). Several documents directly address the defense of the coast and the establishment of a Coast Police. *See* Summary List, Documents dated March 4, 1861 (Document 53), June 22, 1861 (Document 99), June 24, 1861 (Document 98), June 19, 1861 (Document 101), June 17, 1861 (Document 102), June 11, 1861 (Document 104), October 5, 1861 (Document 114), October 16, 1861 (Document 141), December 27, 1861 (Document 152), February 18, 1863 (Document 190), February 20, 1863 (Document 203), and June 25, 1863 (Document 210).

In 1863, an Act relating to the war tax imposed was amended. The Governor was charged with appointing commissioners to ascertain what parishes should be exempt from such tax. No. 4624, An Act to Amend an Act entitled "AN ACT TO PROVIDE FOR THE PAYMENT BY THE STATE OF THE WAR TAX OF THE CONFEDERATE STATES, AND FOR THE COLLECTION OF THE SAME FROM THE TAX-PAYERS IN THIS STATE," 1863, Vol. XIII, Statutes at Large (Rep. Printing 1875). Documents dated July 22, 1862 (Document 169), August 6, 1862 (Document 174), August 23, 1862 (Document 168) are letters to the Governor relating to the war tax.

Governor's duties also included issuing proclamations prohibiting the exportation of provisions, and violators of such proclamations were subject to penalties. In 1863, a statute was enacted to enforce the Governor's proclamations. Act No. 4635, AN ACT TO ENFORCE ANY PROCLAMATION OF THE GOVERNOR PROHIBITING THE EXPORTATION OF PROVISIONS, 1863, Vol. XIII, Statutes at Large (Rep. Printing 1875). Letters relating to exports are found in Documents dated April 30, 1860 (Document 222), two Documents dated April 3, 1863 (Document 236 and 236a), and one dated April 4, 1863 (Document 235). [14]

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[14] Other official duties of the Governor during the applicable time period reflected in statutes include endorsing the guaranty of Confederate bonds, Act No. 4633, AN ACT TO PROVIDE FOR A GUARANTY BY THE STATE OF THE BONDS OF THE CONFEDERATE STATES , 1863, Vol. XIII, Statutes at Large (Rep. Printing 1875), and June 29, 1863 (Document 207), Document 208 (undated); appointing officers and surgeons to examine persons claiming exemption from service, Act No. 4663, AN ACT TO PROVIDE FOR VOLUNTEER COMPANIES OF MOUNTED INFANTRY, AND FOR OTHER PURPOSES , 1863, Vol. XIII, Statutes at Large (Rep. Printing 1875); proclaiming by determination of vote those elected to the Congress of the Confederate States of America, Act No. 4664, AN ACT TO PROVIDE FOR THE ELECTION OF MEMBERS OF THE CONGRESS OF THE CONFEDERATE STATES OF AMERICA FROM THIS STATE , 1863, Vol. XIII, Statutes at Large (Rep. Printing 1875); pursuant to police powers, Governor is authorized to exempt persons from military service that he adjudges indispensable for the government, order portion of militia to appear before officers to present claims of exemption, and approve rules and regulations relating to duties of enrolling officers and related surgeons, Act No. 4704, AN ACT TO AUTHORIZE THE GOVERNOR TO REQUIRE THE EXEMPTION OF CERTAIN STATE OFFICERS AND OTHER PERSONS FORM CONFEDERATE SERVICE , 1863, Vol. XIII, Statutes at Large (Rep. Printing 1875) and Act No. 4669, AN ACT TO DECLARE

The fact that many of the official duties of the Governor, a public official, are specifically addressed by the referenced Documents, lends strong support to the State's position that the Documents are public records.[15]

Further provision for Executive Offices was made in December 1865 by Act No. 4754, Statutes at Large of South Carolina, Vol. XIII, Statutes at Large (Rep. Printing 1875). The Act contained detailed record keeping provisions for the Governor, and also provided that the Secretary of State was to "collect, deposit and keep in Columbia all the books, records and papers belonging to thereto ['the Executive Chamber']". *Id.* Accordingly, under this provision, the Secretary of State had the responsibility of collecting any records of the Office of the

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AND AMEND THE EXEMPTION LAW OF THE STATE, AND FOR OTHER PURPOSES , 1863, Vol. XIII, Statutes at Large (Rep. Printing 1875).

[15] Some of the Documents in Debtor's possession appear to be several ordinances adopted at the Convention of the People of the State of South Carolina in December 1860. These Ordinances include an Ordinance to make Provisional Arrangement for the Continuance of Commercial Facilities in South Carolina (Document 2); an Ordinance to Alter the Constitution of the State of South Carolina, in respect to the Oath of Office (Document 3); an Ordinance to make Provisional Postal Arrangements in South Carolina (Document 4); and an Ordinance to alter the Constitution of the State of South Carolina in respect to the Executive Department (Document 5). *See* Ordinances and Constitution of the State of South Carolina, with the Constitution of the Provisional Government and of the Confederate States of America: Electronic Edition. South Carolina. Convention (1860--1862), *at http://www.docsouth.unc.edu/ southcar/south.html* (First edition, 1999, University of North Carolina at Chapel Hill).

Governor that were missing or stored elsewhere, which may include the Documents in question in this case. Although these statutes were enacted following the time periods covered by the Documents, they weaken the Plaintiff's argument that Governor's records have always been considered private and that the State has historically kept few record keeping requirements.[16]

In a decision concerning records of a state office, the South Carolina Supreme Court found that certain records were public documents "for the reason that they relate either to the *rightful discharge of the duties of the office* of the defendant or to his violation of the official trust reposed by the state in him ...." *State v. Farnum,* 73 S.C. 165, 53 S.E. 83, 85 (1905) (emphasis added). Accordingly, the Supreme Court's definition of a public record in *Farnum* is consistent with the nature of the Documents herein--they relate in many instances to the discharge of the duties of the office of the Governor.

Finally, the State presented evidence that the "docketing" on the back of many of the Documents is consistent with that of the docketing systems in place by governmental offices at that time, and that the Documents are similar in nature and possess similar docketing to other documents from the same Governors' administrations that are currently housed as public documents at the South Carolina Department of

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[16] The State produced evidence that the State made efforts to recover records, including executive records, after the Civil War. *See* REPORT OF THE SPECIAL JOINT COMMITTEE IN REGARD TO CERTAIN PUBLIC PROPERTY ON HAND AT THE EVACUATION OF COLUMBIA , p. 24-25 (Fontaine 1866). While this report does not specifically refer to the Documents in this case, it does tend to evince that executive documents were removed and were intended to be returned.

Archives. Such a docketing system appears to indicate an intent to preserve the document as relating to the public office. This appears to include originals of documents that relate to official, public duties as well as retained drafts, i.e. drafts intended to be retained in the public office to further the function of the office.

To the extent documents are not original documents or to the extent there is no indication that they were intended to be a retained draft by docketing, such a document may not be a public record. Mere drafts may not be a public record in that they may not be consistent with the actual public record and particularly where there is no indication of an intent to preserve them. In the matter before the Court, the State presented evidence that certain of the Documents may in fact be "retained drafts" of outgoing correspondence. As such, it is possible that a number of the Documents may in fact be in original form preserved in a location accessible to the public. Although the State asserts that docketing on the backs of these documents indicates an intent to retain them as a record of governmental functions, it is unclear as to which of the applicable Documents fall within such a category. As previously noted, the Court was not provided with the original Documents nor requested to make such a distinction, as the parties determined to present their positions as applicable to the Documents as a whole.[17] *See* Op. S.C. Att'y Gen., 1984 WL 159931 (October 26, 1984)

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[17] The Court directed the parties to confer and determine whether the Documents were to be addressed by the Court in their totality, such that this decision would apply to them all collectively, or whether the Documents were to be presented separately such that different determinations may be made based upon each one's content. The parties agreed to tender a summary list of the 444 Documents and did not seek individual determinations of each Document's nature and title.

(notes that drafts or notes that are *not intended* as final evidence of the knowledge to be recorded may not be a public record) (emphasis added). Nevertheless, the Court recognizes that an examination of certain specific Documents may lead to differing conclusions as to their nature.

In sum, the Documents as a whole appear to relate to the official duties of the public office of the Governor and, for the reasons stated herein, appear to be public records. Plaintiff did not provide sufficient evidence that the Documents became personal property on the date of the respective Governor's resignation, departure, or loss of actual possession--were it not for war conditions, certain of the Documents would be presumed to have been preserved and dealt with in the ordinary transition between Governors. The nature of the Documents having been determined, title to these records must still be addressed.

B. Common Law and Title to the Documents

The Supreme Court of South Carolina has previously addressed title to public records in varying factual situations. In *Ex parte Whipper,* the Supreme Court determined that books and records being improperly withheld by a public official should be surrendered. 32 S.C. 5, 10 S.E. 579, 582 (1890). In so holding, the Supreme Court definitively stated as follows:

> The records of a public office are in no sense *private property.* They are very important to every citizen.

Id. (emphasis added). The Supreme Court was even more definitive on the issue in the early 1900's. *Farnum,* 53 S.E. at

85. In *Farnum,* a state officer refused inspection of the books and records of the state dispensary and alleged that certain of the documents were private. *Id.* The Supreme Court discussed the need for a determination to be made whether the papers relate to private affairs or relate to the duties of the office or its affairs. In support of its determination that the public records be turned over by a public official and be retained in the public office, the Court cited an earlier opinion with respect to records of the Secretary of State. *Id.* (citing *Pinckney v. Henegan,* 33 S.C.L. 250, 1848 WL 2877 (2 Strob. Feb. 1848)). In determining that it is the public duty of an officer to keep records relating to their duties, the Supreme Court quoted as follows:

> The public records in the Secretary of State's office do not belong to the Secretary. They are the property of the state. He is the mere keeper under her authority. Whatever she will about them, he is bound to obey.

Id. (citing *Pinckney,* 1848 WL 2877 at *2). Furthermore, it has been recognized in South Carolina commentary that this language in the common law provides support "for the public nature of South Carolina government documents." Jean Hoefer Toal and Brandon Riley, *The New Role of Secret Settlements in the South Carolina Justice System,* 55 S.C. L.Rev. 761, 762 (2004).

The Supreme Court reinforced its holding in *Ex parte Whipper* on several occasions by citing the determination made therein that "the records of a public office are in no sense private property" in cases involving objections to the surrender of records by public officials. *Burnett v. Langston,* 164 S.C. 99, 162 S.E. 72, 73 (1932); *Carrison v. Young,* 125 S.C. 42, 118

S.E. 32, 37 (1923).

More recently, the Supreme Court again addressed the private versus public nature and ownership of a certain document. *American Heart Association v. County of Greenville,* 331 S.C. 498, 489 S.E.2d 921 (1997). In *American Heart Association,* an action was commenced requesting a declaration that the original will and signature of "Shoeless Joe" Jackson is personal property, rather than a public record, that should be deemed an asset of his estate. *Id.* at 500, 489 S.E.2d at 922. The Supreme Court determined that the will was a public record based upon current statutory authority. Therefore, the Supreme Court affirmed the lower court's determination that the deliverer of a will could not gain ownership in the actual document, and determined that ownership could thus not be devised to Jackson's wife or appellant charities. *Id.* at 500-01, 489 S.E.2d at 922-23. Although a variant of previous factual circumstances, this decision of the Supreme Court appears consistent with its earlier precedent.

Considering the above-cited authority collectively, it appears that the Supreme Court has directly addressed the public nature of a government document and determined the title and ownership of public records.[18]

Finally, it has been generally recognized that public records are considered property of the state and can only lose their nature as a public record pursuant to law:

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[18] Such determination renders it unnecessary for this Court to certify a question to the South Carolina Supreme Court on these issues, as will be addressed hereinafter.

> [B]ecause public records and documents are the property of the state and not of the individual who has them in his or her possession, the custodian of a public record cannot destroy it, deface it, or give it up without authority from the same source that required the record to be made.

66 AM. JUR. 2D *Records and Recording Laws* § 11 (May 2004). *See also Farnum,* 53 S.E. at 85 (public records are property of the state--whatever the state will about them, officers of the state are bound thereto). A decision from the North Carolina Supreme Court has similarly held. *State v. West,* 293 N.C. 18, 235 S.E.2d 150 (1977). In *West,* the state of North Carolina brought an action to be declared the owner of two bills of indictment issued in 1767 and 1768. The indictments were in the possession of an individual who had purchased them at an auction.[19] The possessor of the indictments alleged that he was the owner of them and that the state had abandoned the indictments. The court noted that the indictments were part of the court records and bore upon their face notice of their public nature. The court concluded that title was shown in the state, and there being no showing that the state had intentionally abandoned the property, found that the state was entitled to possession of the indictments. *Id.,* 293 N.C. at 31-32, 235 S.E.2d at 157-58. The court also noted that even if the indictments had been mislaid or lost, or purchased

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[19] There was no evidence of how the bills of indictment left the court system, however, there was evidence that the indictments had once been in the possession of the Greensboro Historical Museum and sold to another individual. *West,* 293 N.C. at 23-24, 235 S.E.2d at 153.

by a subsequent purchaser for value, the one in possession would still be liable to the true owner. *Id.*

The holding in *West* has been reiterated by the federal court in North Carolina. *United States of America v. North Carolina's Original Copy of the Bill of Rights,* No. 5:03-CV-204-BO, slip op. (E.D.N.C. Feb. 19, 2004), *vacated and remanded with instructions sub nom., United States of America v. Matthews (In re Matthews),* 395 F.3d 477 (4th Cir.2005) (vacated based upon jurisdictional grounds due to dismissal of related forfeiture action). In the *Bill of Rights* case, the District Court relied upon the authority set forth by the court in *West* and determined that the state remained the lawful owner of the Bill of Rights and never abandoned its rights, noting that public records and documents are property of the state and not of the individual that has them in possession, and that removal can only be under authority of the legislature for a purpose so designated. *Id.* at 6 (citing *West,* 229 S.E.2d at 832).

These cases appear to stand for the proposition that a subsequent possessor or purchaser of the public documents at issue in those cases, whether lost, mislaid, or stolen documents, cannot acquire superior rights as to the owner. South Carolina law does not appear to be to the contrary. *See* 9 S.C. Juris. *Abandoned and Lost Property* §§ 21-23 (1992 & 2004 Supp.) ("A finder acquires only such property interest or right as will enable him to keep the property against all the world but the rightful owner"). Additionally, it has been recognized that there is no state authority for a gift of state historic records absent approval of the General Assembly. Op. S.C. Att'y Gen., 1965 WL 11245 (July 23, 1965). In conclusion, it appears that the State has met is burden of proving superior title to the Documents.

C. The State Records Act

The State argues that the State Records Act, in particular S.C. CODE ANN. §§ 30-1-10(A) & 30-4-20(c) (Law. Co-op.1991 rev, & West Supp.2004), is controlling and provides that the Documents are property of the State of South Carolina. The State also contends that the State Records Act requires persons in possession of public records to deliver them to the legal custodian or Department of Archives as provided therein. S.C. CODE ANN. § 30-1-50 (Law. Co-op.1991 rev.).

There is no indication that the remedies provided in the State Records Act have retroactive application, and the State has not presented any evidence to convince the Court that the State Records Act is controlling in this matter. Further, the Court notes that § 30-1-50 provides a penalty for failure to deliver records *as required under this chapter* following receipt of a certified letter from the legal custodian of the record or the Director of Archives.[20] The State's citation to § 30-1-50 implies that receipt of a written request to turnover public records essentially means that the object of that request is therefore a

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[20] S.C. CODE § 30-1-50 (Law. Co-op.1991 rev.) provides as follows: Fifteen days after receipt of a certified letter from the legal custodian of the record or the Director of the Archives, a person in possession of a public record who refuses or fails to deliver as required in this chapter the record to the requesting party is guilty of a misdemeanor and, upon conviction, is fined not exceeding five hundred dollars. In addition, the legal custodian of the public records or the Director of the Archives may apply by verified petition to the court of common pleas in the county of residence of the person withholding the records and the court shall upon proper showing issue orders for the return of the records to the lawful custodian or the Director of the Archives.

public record. Such an argument would appear to presuppose a conclusion that the request for turnover automatically renders a document of public nature. To the extent the State relies upon such an argument, the Court is not persuaded that the State's request for a document determines whether it is a public document. However, a review of the broad *definition* of a public record in the State Records Act, if it were applicable, would weigh in favor of the State's position that the Documents are public records. *See* S.C. CODE ANN. § 30-4-20(c). [21]

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[21] A "public record" includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body. Records such as income tax returns, medical records, hospital medical staff reports, scholastic records, adoption records, records related to registration, and circulation of library materials which contain names or other personally identifying details regarding the users of public, private, school, college, technical college, university, and state institutional libraries and library systems, supported in whole or in part by public funds or expending public funds, or records which reveal the identity of the library patron checking out or requesting an item from the library or using other library services, except nonidentifying administrative and statistical reports of registration and circulation, and other records which by law are required to be closed to the public are not considered to be made open to the public under the provisions of this act; nothing herein authorizes or requires the disclosure of those records where the public body, prior to January 20, 1987, by a favorable vote of three-fourths of the membership, taken after receipt of a written request, concluded that the public interest was best served by not disclosing them. Nothing herein authorizes or requires the disclosure of records of the Board of Financial Institutions pertaining to applications and surveys for charters and branches of banks and savings and loan associations or surveys and examinations of the institutions required to be made by law. Information relating to security plans and devices proposed, adopted, installed, or utilized by a public body, other than amounts

In conclusion, Plaintiff argues and presented testimony to the effect that the State has been inactive in preserving public records and that Governor's records are often not maintained by the Department of Archives. Further, Plaintiff asserts that in 1801 South Carolina Governor Drayton, whose Governor's papers are at the Department of Archives, urged the legislature in the early 1800's to require Governors to maintain records. Plaintiff indicates that such a law was never passed.[22]

However, given the previous statutes cited, and the eventual establishment of the Historical Commission of South Carolina in 1905, it appears that the State has been active in preservation of its records. The State presented testimony to the effect that the Department of Archives has records of every South Carolina Governor since 1860 with certain exceptions, and that it is the duty of the Department of Archives to store and preserve public records. S.C. CODE ANN. § 30-1-100 (Law. Co-op.1991 rev.). Further, the State has presented authority, including case law from the highest court of this State, that official records are public and cannot be considered private property. Plaintiff did not present convincing evidence to support its conclusion that Governor's records involving public functions are considered private, and that they are generally kept by each Governor to do with what they

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expended for adoption, implementation, or installation of these plans and devices, is required to be closed to the public and is not considered to be made open to the public under the provisions of this act. S.C. CODE ANN. § 30-4-20(c). The definition of "public body" is similarly broad. S.C. CODE ANN. § 30-4-20(a).

[22] Plaintiff presented evidence in the form of Governor Drayton's Executive Journal, which is illegible. Plaintiff's counsel represented that due to the age of the documents, the copies submitted into evidence are the best drafts obtainable.

wish.[23]Plaintiff also argues that there are other Governor documents out of the possession of the Department of Archives, but the State has never pursued receipt of those documents until the present litigation. However, the nature and ownership of those documents are not before the Court, and based upon the evidence presented, the State has met its burden of proving its title to these particular Documents.

III. OTHER CLAIMS

Plaintiff argues that even if the State were able to claim the Documents, there are a number of legal theories and defenses to defeat such claims.[24] Plaintiff first asserts that the claims are

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[23] In support of his argument, Plaintiff cited a 1959 Attorney General opinion responding to a request for South Carolina Governor's letters between the years 1942 and 1945. Op. S.C. Att'y Gen., 1959 WL 10669 (Dec. 8, 1959). In the opinion, the Attorney General noted that the papers could not be located at that time and that most of the Governors during those three years (five Governors occupied the office during this turbulent time) either took with them or destroyed their papers. *Id.* The State responded by noting that those records of Governor's during that time period were in fact located and are housed and preserved by the Department of Archives.

[24] Plaintiff cites to the statute of limitations, abandonment, waiver, estoppel, laches, unconscionable and inequitable conduct, and staleness. By Order entered June 8, 2005, the Court directed submission of proposed orders fully addressing all matters that the parties sought to be considered by the Court. Any issue not specifically addressed is concerned abandoned as set forth in the Order. Accordingly, the Court addresses the common law defenses and doctrines as raised by Plaintiff. In two instances in his proposed Order, Plaintiff raises issues concerning correspondence

barred by the predecessor to S.C. CODE ANN. § 15-3-530 (Supp.2004) which currently provides for a three year limitation period for certain matters. He asserts that several sections of the 1942 South Carolina Code of Laws are applicable (§§ 143, 367 and 388) which provide for a six-year limitation period. Plaintiff asserts that the State had actual knowledge of the existence of these documents and their possession by the Law/Willcox family since 1947 based upon the correspondence between Meriwether and Willcox's ancestors, and that the statute of limitations ran in this matter during 1954.

The burden of establishing a statute of limitations bar is on the one asserting it. *Brown v. Finger,* 240 S.C. 102, 124 S.E.2d 781 (1962). [25] Plaintiff asserts that Meriwether was a State employee, and that the South Caroliniana Library (the "Library"), as a branch of the University of South Carolina, is a part of the State government. The State contends that Meriwether was acting in his capacity as a Caroliniana Society Secretary rather than as a public employee, and that in any event the State Historical Commission at that time was the only State agency with authority to acquire government records for South Carolina and thus the State could not be bound by the actions of

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between Dr. R.L. Meriwether and Plaintiff's ancestors. These two instances are with respect to the statute of limitations and laches.

[25] The Court notes that this matter is not actually one for turnover by the State, but is for declaratory relief. Nevertheless, Plaintiff cited such defenses in the Complaint. As a matter of judicial economy, and inasmuch as the parties have addressed the issue, the Court will address the affirmative defenses raised by Plaintiff, including that of a statute of limitations bar, with respect to Plaintiff's Complaint. The Court expresses no opinion as to whether such defenses could remain as to any later action commenced with respect to these Documents.

Meriwether or the Library with respect to the Documents.[26]

From an examination of the 1940's correspondence, it appears that Meriwether was, as asserted by Plaintiff, corresponding on behalf of the Library. The Library indicates that in 1906, it was recognized that a committee was necessary to perfect the holdings of the library, which housed "caroliniana." In 1931, the President of the University of South Carolina formed a formal committee in an effort to "halt the exodus of the state's historical resources to out-of-state repositories." *http:// www.sc.edu/library/socar/ about.html.* This committee later became the University South Caroliniana Society in 1937. In 1940, the South Caroliniana Library was designated as a new institution charged with the "task of documenting the history and literature of the Palmetto State." *Id.* The Library's collections include books, manuscripts, modern political collections, and university archives. The modern political collection specifically indicates that it collects, preserves, and encourages research in private papers documenting South Carolinians and their government post-World War II. *http://www.sc.edu/library/socar/mpc/index.html.* The University South Caroliniana Society is a private non-profit organization of the South Caroliniana Library with the sole purpose of supporting the Library in its mission. The Society

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[26] The State also argues that statutes of limitation do not run as to suits for injunctive relief, *Richland County v. Kaiser,* 351 S.C. 89, 567 S.E.2d 260 (S.C.Ct.App.2002). Nevertheless, inasmuch as the litigation before the Court at this time is broader than one for injunctive relief, and inasmuch as statutes of limitations as a general proposition do apply to the State, *Condon v. City of Columbia,* 339 S.C. 8, 528 S.E.2d 408 (2000), the Court is reluctant to find that the holding in *Kaiser* extends to this case. The State further argues that statutes of limitations do not run against the State when it is acting in the public interest and not in a proprietary capacity, but the State does not cite any controlling authority for this proposition.

indicates that the "[p]reservation of the public records of South Carolina is the responsibility of her government, but it is a poor history of a people that is based on government records alone."[27]

In the correspondence at issue, although Meriwether references the Caroliniana Society throughout the papers, which apparently supports the Library, the Letters tend to indicate, as argued by Plaintiff, that Meriwether was in fact acting on behalf of the Library. He specifically requests that the papers be gifted to "our library." *See* Plaintiff's Exhibit 34, Letter Dated August 18, 1947. Other references are to "our library" in the correspondence.

It appears that the Library is part of the University of South Carolina, and such state supported universities have been considered a body of the State of South Carolina. *See Olson v. Faculty House,* 344 S.C. 194, 544 S.E.2d 38 (S.C.Ct.App.2001) (the university is a governmental entity under the Tort Claims Act); *Paddock Equipment Co. v. University of South Carolina,* 289 S.C. 219, 345 S.E.2d 749 (S.C.Ct.App.1986) (considering the University of South Carolina as a governmental entity in public contract dispute). *See also, e.g.*, S.C. CODE ANN. § 1-11-55 (Law.Co-op.2005) (university branch of the state is considered a governmental body in statutes governing lease of property); S.C. CODE ANN. § 2-15-50 (Law.Co-op.2005) (university supported by state funds is state agency for purposes of financial audit provisions). Nevertheless, the question remains whether Meriwether's actions, assuming he was acting as an employee of the Library, are binding upon the State.[28]

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[27] http://www.sc.edu/library/ socar/uscs/index.html.

[28] Plaintiff notes that half of Governor Hollings' records and the bulk of Governor McNair's records were sent to the University of South Carolina. No further information was provided, and no

It appears well settled that "a public officer derives his authority from statutory enactment, and all persons are in law held to have notice of the extent of his powers, and therefore, as to matters not really within the scope of his authority, they deal with the officer at their peril." *Clemson Assoc., Inc. v. Robinson,* 259 S.C. 105, 190 S.E.2d 738 (S.C.1972) (citing authority). *See also South Carolina State Highway v. Butterfield,* 216 S.C. 463, 58 S.E.2d 737 (S.C.1950). South Carolina law has addressed circumstances in which a public official attempts to bind the State, or another department of the State. In *Butterfield,* an Assistant Attorney General made representations on behalf of the Highway Department as to actions the Highway Department would take in a condemnation suit. 216 S.C. 463, 58 S.E.2d 737. The South Carolina Supreme Court determined that the Assistant Attorney General could not bind the Highway Department, noting that there is "no function imposed upon him by law allowing or permitting him to bind the Highway Department as to what it will do in the future." *Id.,* 58 S.E.2d at 739. In *Robinson,* the board of trustees of a school district accepted an offer to purchase school district property without the consent of the board of education. 259 S.C. 105, 190 S.E.2d 738. By statute, the board of education must consent to such sale. *Id.* at 112-13, 190 S.E.2d at 741-42. The Supreme Court concluded that the actions of the board of trustees could not bind the board of education, inasmuch as a public officer derives his authority from statutory enactment, and the board of education was the entity embodied with the authority to sell such property. *Id.* at 114, 190 S.E.2d 738. Finally, in *Baker v. State Highway Dep't,* the Supreme

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evidence was presented that such records, or other records noted by Plaintiff to be located elsewhere, are of the same nature as those presented in this case or are private in nature. Furthermore, this Court expresses no opinion on the public or private nature of any other Governor documents.

Court held that a public officer of the highway department could not bind the state by the highway department officer's agreement to accept alternative funds in contravention of his authority. 166 S.C. 481, 165 S.E. 197 (1932), *overruled on other grounds McCall v. Batson,* 285 S.C. 243, 329 S.E.2d 741 (S.C.1985).

It appears that the Historical Commission of South Carolina had the care and custody, by statute, of all of the official archives of the State of South Carolina at the time of the correspondence between Meriwether and Ms. Law and Ms. Storm. S.C. CODE § 2234 (1942). *See also* S.C. CODE § 9-8 (1952) (same provision).[29] The Historical Commission appears to be the predecessor to the Department of Archives, which was established in 1954. S.C. CODE § 9-3 (1962 and 1975 Cum.Supp.). The statutes provide as follows:

The objects and purposes of the Historical Commission are: the care and custody of all the official archives of the State not now in current use; the collection of materials bearing upon the history of the State, and of the counties and territory included therein, from the earliest times; the collection of all documents or transcripts of documents and of material relating to the history of South Carolina, and all its territory and inhabitants; and particularly of procuring of data concerning

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[29] Prior to Ms. Storm's correspondence with Meriwether, Plaintiff presented a number of letters spanning a period of nearly a decade between Ms. Storm and the Southern Historical Society, University of North Carolina concerning acquisition of what appears to be the same Documents at issue in this case. Interestingly, the correspondence reflects that the Southern Historical Society concluded in the late 1940's that the documents are "state house papers." In a letter dated December 3, 1948, the Society indicated that, as a result, they did not believe they had a right under the circumstances to acquire them.

South Carolina soldiers in the war of the Revolution *and the war between the States;* the due and orderly arrangement, indexing and preservation of the same ....

S.C. CODE § 2234 (1942) (emphasis added). *See also* S.C. CODE § 9-8 (1952) (same provision). Therefore, it appears that the Historical Commission was the official entity by statute with custody of the official archives of the State and the collection of materials bearing upon the history of the State, *particularly with respect to the Civil War,* at the time of the correspondence at issue. Based upon statutory authority and the law as cited above, and it appearing that the Historical Commission had the official statutory duty to collect historical documents such as those presented in this case, the Commission (the predecessor to the Department of Archives)--or some executive with responsibility for it--would appear to be the entity that would need to be aware of the existence of the Documents in order to be barred from any claim based upon application of a statute of limitation.

Additional support for the proposition that the State is not barred from pursuing the Documents is provided in the common law of the State of South Carolina as previously discussed, which provides that records similar in nature to the Documents are public records, and are not considered private property, unless the legislature divests the State of ownership by statute. *See Pinckney v. Henegan,* 33 S.C.L. 250, 1848 WL 2877 (2 Strob. Feb. 1848) ("[t]he public records in the Secretary of State's office do not belong to the Secretary; *they are the property of the State.* He is the mere keeper under her authority.") (emphasis added); 66 AM. JUR.2d *Records and Recording Laws* § 11 (May 2004) (public records and documents are property of the state and it cannot be given up without authority from the source that required it to be made). *See also American Heart Assoc.,* 331 S.C. at 500- 01, 489 S.E.2d at 922-23 (will and signature of decedent is a public

record; ownership could not be devised). Therefore, for all the reasons cited above, the Court is not convinced that the statute of limitations bars the State from pursuing the Documents.

Plaintiff also argues that the State has abandoned its property rights with respect to the Documents. In order to conclude that an abandonment has occurred, "there must be some clear and unmistakable affirmative act or series of acts indicating a purpose to repudiate ownership." *Witt v. Poole,* 182 S.C. 110, 188 S.E. 496, 498 (1936). The primary elements of abandonment are intent to abandon and the external act by which the intention is carried into effect. *Id.,* 188 S.E. at 498. Intent to abandon is the paramount inquiry. *Id.* South Carolina commentary has characterized abandonment as the relinquishment of property with intent to never resume ownership or possession. *See* 9 S.C. Juris. *Abandoned and Lost Property* §§ 2 (1992 & 2004 Supp.). *See also Historic Charleston Foundation v. Krawcheck,* 313 S.C. 500, 507 n. 8, 443 S.E.2d 401, 406 n. 8 (S.C.Ct.App.1994) ("To constitute abandonment, it must appear that there was a discontinuance of the use with the intent to relinquish the right to use the property."). Generally, time is of no importance to the issue of abandonment, except possibly to be considered as indicative of intention. *Witt,* 188 S.E. at 498. Intent is to be considered from all the surrounding facts and circumstances. *Historic Charleston Foundation v. Krawcheck,* 313 S.C. at 507 n. 8, 443 S.E.2d at 406 n. 8. The burden is on the party asserting abandonment to prove it by clear and unequivocable evidence. *Carolina Land Co. v. Bland,* 265 S.C. 98, 108, 217 S.E.2d 16, 21 (S.C.1975); *Hayes v. Tompkins,* 287 S.C. 289, 293, 337 S.E.2d 888, 891 (S.C.Ct.App.1985).

Therefore, Plaintiff has the burden of proving the State's abandonment of its right to the Documents by clear and unequivocable evidence. Plaintiff's main support for its

abandonment argument relates to the passage of time--that the State apparently ceased looking for the Documents after 1866 and 138 years went by before they asserted a claim. However, the failure on the behalf of the State to locate the Documents should not serve as conclusive evidence that the State ceased looking for them or abandoned such efforts. Further, as previously noted, the passage of time is not an essential element of abandonment. *Witt,* 188 S.E. at 498. Although time can be indicative of intent, Plaintiff did not clearly establish the State's intent to relinquish its rights to the Documents. The State presented evidence, through a post-Civil War report, that efforts were made to recover public records following the Civil War, and that the report indicates that records of the Executive Department had not been turned over. REPORT OF THE SPECIAL JOINT COMMITTEE IN REGARD TO CERTAIN PUBLIC PROPERTY ON HAND AT THE EVACUATION OF COLUMBIA, p. 6 (Fontaine 1866). Plaintiff asserts that an addendum to the Report provides that such records were in fact returned. *Id.* However, the provision cited by Plaintiff in the addendum makes no reference to records of the Executive Department. The Report, in conjunction with the eventual establishment of the Historical Commission in 1905, provides support for the State's efforts to maintain the importance of public records and preserve its rights. The Court recognizes that the issue of intent is a factual determination that may be difficult to establish, particularly given the historical record. Nevertheless, the law provides that intent to abandon, considering all the surrounding facts and circumstances, must be clear. Plaintiff was unable to meet his burden of proving such intent on the part of the State.[30]

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[30] Plaintiff again notes that the Department of Archives has one set of Governor's records from the Antebellum period, and further emphasizes, as stated earlier, that the State has never initiated a lawsuit for the return of records such as the Documents in this case. Plaintiff also points to the fact that the Department of

Plaintiff also asserts defenses of laches, staleness, estoppel, and waiver. An essential element of laches is unreasonable delay for or an unexplained length of time. Knowledge of rights, reliance and prejudice are additional elements. *Whitehead v. State,* 352 S.C. 215, 219, 574 S.E.2d 200, 202 (S.C.2002). "The party asserting laches has the burden of showing negligence, the opportunity to act sooner, and material prejudice." *Richey v. Dickinson,* 359 S.C. 609, 598 S.E.2d 307, 309 (S.C.Ct.App.2004) (citation omitted). Delay does not, alone, constitute laches, and the "failure to assert a right does not come into existence until there is a reason or situation that demands assertion." *Muir v. C.R. Bard, Inc.,* 336 S.C. 266, 298, 519 S.E.2d 583, 599 (S.C.Ct.App.1999).

Plaintiff has not presented convincing evidence that there has been unreasonable or unexplained delay, particularly since it appears that the sequence of events with respect to the Documents was a mere consequence of historical events.[31] As

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Archives traveled to England in the 1970's to bid on letters from the 1700's of a former South Carolina Governor. The State asserts that issues with respect to records of Colonial Governors are distinguishable from the Documents in this case. The Court is not convinced that any of these circumstances rise to the level of an intent to abandon the Documents in this case on the State's part.

[31] Laches has additionally been asserted where an unreasonable delay causes his adversary to incur expenses or otherwise detrimentally change his position. *Muir,* 336 S.C. at 296, 519 S.E.2d at 598-99. Plaintiff argues that he relied upon Stroup's assertion, denied by Stroup, that the Department of Archives was not interested in the Documents. Plaintiff incurred auction advertising and preparation expenses. The proof of claim filed by the auction house in Plaintiff's bankruptcy case in the approximate amount of $1,300.00 indicates that the expenses were incurred for

noted above with respect to the statute of limitations, the Historical Commission, the entity charged with the care, custody, and collection of material relating to the history of South Carolina, S.C. CODE § 2234 (1942), was not aware that the Documents were in Plaintiff's position until a short period of time prior to the auction. Further, there is little or no evidence of detrimental reliance on the State's position. Therefore, laches does not apply. Likewise, staleness of demand is similarly inapplicable inasmuch as the claims in this case have not been shown to have been after an "unexplained delay of such great length as to render it difficult or impossible for the court to ascertain the truth of the matters in controversy and to do justice between the parties." *All Saints Parish v. The Protestant Episcopal Church*, 358 S.C. 209, 236, 595 S.E.2d 253, 268 (S.C.Ct.App.2004) (quoting *Presbyterian Church v. Pendarvis*, 227 S.C. 50, 59, 86 S.E.2d 740, 744 (S.C.1955)).

With respect to Plaintiff's claim of estoppel, the doctrine applies as follows:

> The elements of estoppel as to the party estopped are (1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts. As to the party

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advertising for July and August. The auction was to occur on August 7, 2005, and the conversation between the auctioneer and Stroup occurred on July 27, 2004. Although the time period between the conversation and the scheduled auction is brief, whether Plaintiff is entitled to reimbursement for incurred expenses, based upon any representations made, is not before the Court.

> claiming estoppel, the elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; and (2) reliance upon the conduct of the party estopped.

Maher v. Tietex Corp., 331 S.C. 371, 500 S.E.2d 204, 209 (S.C.Ct.App.1998). Plaintiff alleges that he relied upon Stroup's assertion, denied by Stroup, that the Department of Archives was not interested in the Documents on July 27, 2004. Nevertheless, Plaintiff did not convince the Court that any such representation was made with knowledge of the true facts nor that Plaintiff lacked knowledge that the State could have a claim for the Documents. Stroup further testified that at the time the conversation took place, he was not aware as to whether the State would have a claim to the Documents and that he had not yet fully reviewed them. Further, it is noteworthy that the State only became involved with communications regarding the Documents in close proximity to the scheduled auction date of August 7, 2004. According to testimony and the proof of claim filed by the auction company in this case, advertising expenses had already been incurred as the auction was scheduled for August 7, 2004. Finally, it has been generally recognized that estoppel does not lie "against the government to prevent the due exercise of its police power or to *thwart the application of public policy.*" *Greenville County v. Kenwood Enterprises, Inc.*, 353 S.C. 157, 577 S.E.2d 428 (S.C.2003) (emphasis added). Accordingly, the elements of estoppel to not appear to have been established.

Finally, waiver has been defined as a "simple voluntary relinquishment of a right with knowledge of all the facts ...." *City of North Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 599 S.E.2d 462, 466 (S.C.Ct.App.2004) (citing *South Carolina Tax Comm'n v. Metropolitan Life Ins. Co.*, 266 S.C. 34, 40, 221 S.E.2d 522, 524 (1975)). Plaintiff alleges that Stroup's conduct

in assuring the auctioneer that the State had no interest in the Documents constitutes waiver. However, as previously noted, Stroup testified that he had not yet fully reviewed the Documents. In any event, in order to constitute waiver, the waiving party must have knowledge of all the facts. *Id.*[32] Inasmuch as Stroup testified that he had not yet fully reviewed the Documents at the time of the conversation with the auctioneer, it does not appear that Stroup had knowledge of all the facts in order to voluntarily relinquish a right to the Documents.[33] Accordingly, the Court is not convinced that the common law defenses and doctrines raised by Plaintiff bar the State's claims based upon the evidence presented.

IV. CERTIFICATION OF QUESTIONS OF LAW

The State alternatively has moved for certification of questions of law in this case to the South Carolina Supreme Court. Plaintiff opposed such certification. South Carolina Appellate Court Rule 228 provides the procedure for certification of a question of law from another court and in pertinent part states as follows:

(a) Scope of Certification. The Supreme Court

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[32] Knowledge of the true facts is also an element of estoppel, and the analysis set forth with respect to this analysis of waiver is thus equally applicable to the doctrine of estoppel as addressed herein.

[33] Plaintiff also alleges that the State's claims should be barred by the inequitable conduct of the State, through the action of Stroup by misleadingly promising the auctioneer that he was not interested in making a claim to the Documents, as previously discussed. Stroup testified that he did not recall making such a promise. In any event, the Court was not convinced by the evidence presented that Stroup acted in bad faith or in an inequitable manner.

> in its discretion may answer *questions of law* certified to it by any federal court of the United States or the highest appellate court or an intermediate appellate court of any other state, when requested by the certifying court if there are involved in any proceeding before that court questions of law of this state which may be determinative of the cause then pending in the certifying court *when it appears to the certifying court there is no controlling precedent* in the decisions of the Supreme Court.

Rule 228, SCACR (emphasis added).

Certification of a question of law to a state court in a bankruptcy case is an appropriate procedure when the issue is based solely on unsettled state law or involves complex state law questions. *See Chemical Bank v. First Trust of New York (In re Southeast Banking Corp.),* 156 F.3d 1114 (11th Cir.1998); cf. *Pyne v. Hartman Paving, Inc. (In re Hartman Paving, Inc.),* 745 F.2d 307, 309 n. 2 (4th Cir.1984).[34] Furthermore, certification rests in the discretion of the federal court. *Lehman Bros. v. Schein,* 416 U.S. 386, 390, 94 S.Ct. 1741, 1744, 40 L.Ed.2d 215 (1974). It is within this Court's jurisdiction to apply the state law, and based upon the statutory authority and common law, the issues presented before this Court, while unique factually, do not appear to present an issue to which there is no controlling precedent under South Carolina law. Further, Plaintiff opposed certification. Certification thus

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[34] The court in *Pyne* concluded that certification of a question to the West Virginia Supreme Court of Appeals was inappropriate because there was controlling precedent on the issue of state law.

appears unnecessary.

CONCLUSION

This decision is limited to the Documents at issue in this case, and the unique circumstances and evidence presented to the Court, and the Court expresses no opinion as to the public nature or ownership of any other Governor documents or other official documents. While the parties presented policy considerations to be weighed by the Court, the decisions reached by the Court is not one of policy, but is based *as required* upon applicable state law and other precedent. Further, this Court cannot use equity to create new substantive rights or to override the provisions of state law. *East Tennessee Natural Gas Co. v. Sage,* 361 F.3d 808, 823 (2004); *In re Three Flint Hill Ltd.,* 202 B.R. 706, 712 (Bankr.D.Md.1995). Although not decided lightly, given the evidence presented by the content of the Documents and their recitation of official and public matters, as well as the common law applied to these particular facts, it appears that the State is the rightful owner of its public records as represented by the Documents. Accordingly, it is hereby

ORDERED that the Documents are not considered property of the estate; and it is further

ORDERED that the State has met its burden of proving superior title to its public records; and it is further

ORDERED that the State's alternative Motion for Certification of Questions of Law to the State Supreme Court is rendered moot or alternatively is denied; and it is further

ORDERED that based upon the Consent Order entered on March 3, 2005 requested by the parties, the Willcox and Patterson Defendants' claims are moot by the determination of the issues decided herein; and it is further

ORDERED that all issues presented in this adversary proceeding having been determined, this proceeding shall be closed.

AND IT IS SO ORDERED.

/s/

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina

August 15, 2005

APPENDIX V

STATUTES

Act No. 405, 1719, Vol 3, Statutes at Large (Cooper, 1838):

. . . Whereas nothing is more necessary for the well-being of a Colony that the preservation of the publick records, whereby the titles of the several in habitants to their estates are secured, and their minds quieted, but sundry evil-disposed and disaffected persons, in open and manifest violation and breach of the several laws of force in this Settlement, and in opposition to the now present establishment, have made away with several of the publick and private Acts of Assembly, as also all the records of grants, mortgages, registries and other titles of the several inhabitants to their respective lands, as also all the original wills, and divers other publick records of this Settlement . . . I. Be it therefore enacted, by the Honourable James Moore, Esq. Governour, with the advice and consent of the Council and Representatives . . . now met in General Assembly in Charlestown . . . if any person or persons whomsoever who hath custody or keeping of such publick records , , , shall not . . . produce and deliver the same to . . . the present Secretary . . . then such person or person and every one of them so offending, shall forfeit and pay . . . .

Act No. 1448 of 1789, Vol. 5, Statutes at Large (Cooper, 1839), p. 102:

. . . . . .Whereas, by an act passed on the twenty second day of March [1786], the town of Columbia was fixed on for the future seat of government and deposit of public records, and whereas it is essential to the general interests of the State that the same

be carried into effect, and that the public records should be removed thereto . . . . all the public records, except such as relate to the property within the districts of Charleston, Georgetown, and Beaufort, shall be removed to Columbia. . . .his Excellency the Governor is hereby authorized and empowered to nominate and appoint three commissioners to separate and set apart the records hereby required to be retained. . . .

Act No. 4754 of 1865 Statutes at Large of South Carolina, Vol. XIII, 1875, p. 340:

"II. . . The Governor shall be furnished with a suitable office, to be called the Executive Chamber, in which all petitions memorials, letters, and all other official papers and documents addressed to or received by him shall be methodically arranged and kept, with proper indexes therefor . . . .He shall keep a record in proper books of . . . all official communications, proclamations and orders issuing from his office; and of all other matters which the Governor may think it important to preserve. . . . IV The Secretary of State shall, during the absence of the Governor from Columbia, be placed in charge of the records and papers in the Executive Chamber. He shall, as soon as practicable, collect, deposit and keep in Columbia all the books, records and papers heretofore belonging thereto . . . ."

S.C. Code Ann. §30-1-10 (1991)

(A) For the purposes of Sections 30-1-10 to 30-1-140 "public record" has the meaning as provided in Section 30-4-20(c). Nothing herein authorizes the Archives to make records open to the public in contravention of Sections 30-4-40, 30-4-50, and 30-4-70, respectively.

(B) "Public body" means any department of the State, any state

board, commission, agency, and authority, any public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts, or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi-governmental body of the State and its political subdivisions, including, without limitation, bodies such S.C. Code Ann.

S.C. Code Ann. §30-1-20 (1991)

The chief administrative officer of any agency or subdivision or any public body in charge of public records or creating, filing, or keeping public records is the legal custodian of these records and is responsible for carrying out the duties and responsibilities of this chapter which are assigned to public agencies, bodies, offices, or subdivisions. He may appoint a records officer to act on his behalf.

S.C. Code Ann. §30-1-40 (1991)

A person having custody of public records, at the expiration of his term of office or employment, shall deliver to his successor, or if there is none, to the Archives, all public records in his custody.

S.C. Code Ann. § 30-1-70 (1991)

The legal custodian of public records shall protect them against deterioration, mutilation, theft, loss, or destruction and shall keep them secure in vaults or rooms having proper ventilation and fire protection in such arrangement as to be easily accessible for convenient use. . . .

S.C. Code Ann. §30-4-20(c)(Supp. 2005)

(c) "Public record" includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body. . . .

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No. 06-1158

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SUPREME COURT, U.S.

In The Supreme Court of the United States

RODGER STROUP, Director, South Carolina Department of Archives and History, STATE OF SOUTH CAROLINA, ex rel Henry McMaster, Attorney General for the State of South Carolina,

Petitioners,

v.

THOMAS LAW WILLCOX, JOHN M. WILLCOX and KATHRYN WILLCOX PATTERSON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This matter is before the Court on a Petition for a Writ of Certirorari from the United States Court of Appeals for the Fourth Circuit. On August 16, 2004, Respondent Thomas L. Willcox filed an application and Petition in the United States Bankruptcy Court for the District of South Carolina under Chapter 11 of the Bankruptcy Code, and on October 12, 2004, the Respondent filed an Adversary Proceeding to Determine to Personal Property and to Declare Personal Property as the Property of the Estate. The Appellant and other Respondents answered and asserted various defenses and claims in this matter.[1] After extensive discovery, and entry of Orders denying Appellant State of South Carolina's Motion to Abstain or for Certification of Questions to the South Carolina Supreme Court, a Joint Pre-Trial Order was entered, and the case tried on June 6th and 7th, 2005, in Charleston, South Carolina.

On August 15, 2005, the Bankruptcy Court issued its Order finding that the documents were not the property of the bankrupt's estate, that the State of South Carolina owned the documents in question, and that the State of South Carolina's Motion to Certify Questions was rendered moot, or, in the alternative, denied. This case was appealed to the District Court with the filing of the Notice of Appeal on August 24, 2005. After briefing by the parties, the decision of the Bankruptcy Court was reversed by the District Court's Order of January 12, 2006. Appeal to the United States Court of Appeals then followed.

The Fourth Circuit, after briefing and oral argument, issued its Opinion on October 27, 2006, which is published

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[1] It should be noted that Respondents John M. Willcox and Kathryn Willcox Patterson claim an ownership interest to the documents in question; however, by agreement of the parties and with the Bankruptcy Court's approval, these Respondents did not appear at or participate in the trial, nor will they take an active role in this proceeding. These Respondents' claims have been severed from this proceeding and will be addressed by later proceedings by the Bankruptcy Court as is necessary.

at 467 F.3d 409. The Court, applying South Carolina common law, found that the possession of the documents by the Respondent and his family for some 140 years raised a presumption of ownership in his favor. As the Appellant did not come forward with evidence of either title or recent possession, it could not rebut the presumption of Respondent's ownership through possession. The Court also noted the Respondent's defenses of statute of limitations and staleness, but did not address those issues given the Appellant's failure to establish title superior to that of the Respondent.

As for the factual background of this matter, Respondent Thomas Law Willcox is a citizen and resident of Seabrook Island, Charleston County, South Carolina. Mr. Willcox was a businessman and contractor most of his working career, but is presently semi-retired and not working due to personal health problems, and health problems with his wife and her family. (J.A. pp. 225-228).

Respondent Willcox is the great-great-nephew of Confederate Major General Evander McIver Law. Respondent's family history is as follows. General Law, originally of Darlington, South Carolina, served with distinction in the Civil War, eventually becoming a Confederate Major General before the war ended. He participated in the battles of First Bull Run, Seven Pines, the Seven Days Battles, Second Bull Run, Antietam, Gettysburg (Round Tops), Chickamauga, Chattanooga, Wilderness, Spotsylvania, and Cold Harbor. (J.A. pp. 27, 33). After his wounding at Cold Harbor, he was involved in the evacuation of Columbia in February of 1865, before its capture by Federal forces led by General Sherman. (J.A. p. 229).

After the Civil War, General Law lived for a time in South Carolina and Alabama, then in 1881 he moved to Bartow, Florida, and established the South Florida Military Institute, a military college modeled after the Citadel. The school closed in the early 1900s after becoming a public institution, and it became a part of the University of Florida

system. For the remainder of his life, General Law served, variously, as a Trustee of Summerlin Institute, a Member of the Polk County Board of Education, and as Editor of the Bartow Courier-Informant. He passed away in 1920 and is buried in Bartow. (J.A. pp. 228, 260-262).

At some point, General Law came into the possession of the subject papers and documents. They consist of a large number of documents concerning Francis Pickens and M.L. Bonham, former Governors of South Carolina, various confederate military dispatches and reports, correspondence and telegrams between various Confederate generals, officers, servicemen, and government officials, and related documents and materials. At present, the collection is in excess of 400 documents.

The papers came into the possession of the Willcox and Law families by being given to Miss Blanche C. Law (Respondent Willcox's great-aunt and sister of his grandmother Elizabeth) by General Law's descendant, Mrs. Annie J. Storm. Respondent's great aunt, Miss Law, was the daughter of Colonel J.A. Law and niece of E.M. Law. She lived her entire life in Darlington, South Carolina. Upon Respondent's great-aunt's death in 1964, the papers were passed to his father (James Carter Willcox), and then to Respondent Willcox. Specifically, Respondent Willcox, after the death of his step-mother, found the documents in a bag in the top of a closet after the Columbia, S.C. family residence had been cleared of other personal property. (J.A. pp. 230-233).

It is unknown exactly how, when, why, where, and by what means General Law came into possession of the documents. (J.A. pp.564-565). However, there is no evidence that General Law illegally obtained these documents, or held the documents when he should not have, or otherwise improperly obtained or retained them. (J.A. p. 264).

The Willcox and Law families have preserved, protected, and organized the documents for approximately the last 140 years. No person, party, entity, or government has ever requested the return of these documents from Respondent Willcox or his ancestors until shortly before the filing of the Chapter 11 proceeding.

Respondent Willcox has previously attempted to sell the documents to various persons, as well as the South Caroliniana Library and the South Carolina Historical Society. His efforts were largely unsuccessful. Accordingly, on May 27, 2004, he entered into a contract, through his company, the Haulover Development Corporation of Johns Island, South Carolina, to auction the Civil War era correspondence. Respondent was using the company for reasons of privacy and to also more effectively order his business affairs. (J.A. pp. 235-236).

Pursuant to the auction agreement, the auctioneer, Dr. Bill Mishoe, had marketed and advertised the auction through placing notices and copies of certain documents to be auctioned on his Internet site and also placed advertisements in industry publications to notify interested persons of the items to be auctioned, and later the time, date and place of the auction. The Associated Press and other news outlets were contacted to make it known there would be an auction, and the subject of the items to be auctioned. Dr. Mishoe expended significant sums in these advertising and marketing efforts. (J.A. pp. 280-283).

On Tuesday, July 27, 2004, Appellant Rodger Stroup, the Director of the South Carolina Department of Archives and History, contacted Dr. Mishoe to discuss these documents. Specifically, he came to the auction house on that date and discussed this matter with Dr. Mishoe. Defendant told Dr. Mishoe at that time that he was being urged to claim these documents and letters, but that he was not interested in doing so. Dr. Stroup further said that while he as not interested in obtaining the actual letters, he would like permission to make a microfilm record of them before

they were sold. Dr. Stroup, at trial, did not deny that this conversation took place. (J.A. pp. 283-284, 571-572).

Based upon that conversation, Respondent Willcox authorized his counsel, Kenneth C. Krawcheck, Esq. of Charleston to allow the copying to take place. Mr. Krawcheck contacted Dr. Stroup directly and made arrangements on this understanding for the microfilming to occur. Furthermore, Mr. Krawcheck personally brought the documents to the South Carolina Department of Archives and History as a courtesy to Dr. Stroup and the State of South Carolina and allowed all of the documents to be microfilmed at that time. This microfilming took place during the afternoon of Thursday, August 5, 2004. All of this was done as an accommodation to Dr. Stroup and the State, and so that an historical record of the documents could be preserved by the State. (J.A. pp.237-239, 284-286).

The auction of these documents was scheduled for Saturday, August 7, 2004. After the microfilming of the documents and without any prior notice or notification, on the morning of Friday, August 6, 2004, Dr. Stroup and the Attorney General's Office for the State of South Carolina obtained a Restraining Order in South Carolina Circuit Court preventing the sale of the documents. Mr. Willcox and Dr. Mishoe both believe that the documents would have brought in excess of $1 Million at auction. The documents have previously been appraised at approximately $2.4 Million. (J.A. pp. 273-274, 285-286).

Respondent Willcox, at this point, was in severe personal and financial straights. He wished to auction these documents anonymously as he did not want to have the glare of publicity due to his and his family's health problems, his natural desire for privacy, and his financial troubles. He had a number of unpaid debts, including two mortgages and notes which were not current. Each of these properties were in foreclosure, and his personal residence was scheduled for a foreclosure sale on August 20, 2004 by the Master-in-Equity for Charleston County. The auction, Mr. Willcox

believes, would have brought in sufficient funds upon which he and his wife would have enough to live, to pay off these and other debts, and to save his home. The last minute issuance of the Restraining Order at the behest of the State of South Carolina affected Mr. Willcox adversely from both a privacy and financial standpoint, and led directly to his bankruptcy filing. (J.A. pp. 235, 239).

Trial testimony revealed that of the 72 Proprietors, Colonial, and State Governors and Executives through the Civil War era (1670 to 1866), the State Archives has in its possession exactly one original set of Governor's documents. These are of Governor Edward Drayton, who served two terms as Governor from 1800-1802 and 1808-1810. (J.A. pp. 236,428, 560). The reason for this is that there were no record keeping requirements applicable to Governor's records, and that the Governors simply left office with their papers when their term of office was ended. Governor Drayton's records apparently survive and are kept at archives because he felt strongly that a Governor should be required to keep records for his successor, despite the practice at the time. He even proposed by message to the legislature that a law be passed requiring Governors to keep and maintain permanent records. (J.A. pp. 323-324, 561). Interestingly, the legislature did not pass any such law. Furthermore, the Archives witnesses do not know if Drayton left his records with the State, or if they were later donated by his family or other individuals. This is likewise true of all Governor's materials held by Archives, at least until relatively recently. (J.A. pp. 425-426).

In late 1865 the Legislature passed a bill to provide for certain record keeping requirements by Governors. However, this law, and its present day successor, merely requires a Governor to maintain certain records- it does not speak to ownership. See S.C. Code Section 1-3-30. After the commencement of Reconstruction (1868), Governor's records then begin to appear in the records kept at Archives; however, individual Governors have to the present kept and

disposed of their records as they have seen fit. For instance, Governor Perry (1865) took his records with him, and they are deposited in large part in the Southern Historical Collection at Chapel Hill or in the Alabama State Archives. (J.A. pp.439). Even in modern times, Governor's records are not necessarily found at Archives. For instance, Governor Thurmond sent his records to Clemson. Governor Hollings sent half of his Governor's records to the University of South Carolina. Governor McNair sent the bulk of his records to the University of South Carolina. (J.A. pp.311-312). To this day there is no requirement that a Governor deposit his records at Archives at the end of his service. Significantly, the word "Governor" is not used even once in the several hundred pages of the Archives Act or the Regulations promulgated under the Act, nor is it included in the definition of public record found in S.C. Code Sections 30-1-10(A) and 30-4-20(c).

During the post Civil War period there is some indication that Governors Bonham and Magrath knew that some Governor's documents had survived the war, and were being held by various Governors, or were being distributed back to them. This can be discerned from correspondence between former Governors Magrath and Bonham, dated May 11, 1883. (J.A. p.743). Accordingly, there seems to be some effort on the part of the Governors at the time to make sure that certain materials were not kept as public records. Furthermore, General Law sold a portion of his collection and papers to a New York book dealer (a Mr. Coster) in 1895 or 1896, and then the dealer sold those documents to the Library of Congress around 1905, where they are still on deposit. (J.A. pp. 318-322, 746). These records, at the Library of Congress, are described as the Pickens/Bonham papers, and are undoubtedly documents and materials received by General Law at the same time he received the materials under litigation, most likely in 1865. In fact, the papers at issue in this case were also sent by General Law to that same dealer, and General Law changed his mind and

asked for their return as he no longer wished to sell them. This is reflected in correspondence from General Law to Mr. Coster, dated February 16, 1896. (J.A p. 746). Obviously, the existence of the papers was well known for some fifty years after the end of the Civil War, and there were no particular secrets about the nature of the papers or the identity of their possessor. Additionally, it nearly goes without saying that General Law acted at all times as the rightful and lawful owner of the papers, and exercised unfettered rights of ownership, including the right to sell them. (J.A. p. 118).

At trial and in appellate proceedings, the State argues from and presents a relatively detailed factual history of related documents, the evacuation of Columbia, and post Civil War investigations. The State originally asserted, without factual foundation, that executive papers were loaded on a railroad car for evacuation to Chester, South Carolina. However, these alleged occurrences were not factually substantiated at trial. Furthermore, while the State argues that the "Report of the Special Joint Committee, in Regard to Certain Public Property on Hand at the Evacuation of Columbia" (1866) shows that the State made efforts to recover records, including executive records, after the Civil War, the report is unclear in several important respects. (J.A. p. 994). It indicates, in part, that the State has not been able to determine what happened to executive records, but then also states that all records of the state were saved and returned to their respective offices. The report does not state what happened to executive records before, during, or after the evacuation of Columbia. Finally, the States witnesses at trial admitted that General Law may have been given the records by legislative act or at the Governor's express direction, but that given the chaos attendant with the evacuation, there was no way to know with certainty what occurred with regard to the records. (J.A. pp. 432, 565).

At trial, evidence was admitted that describes how the documents in this case came to be microfilmed by the

Southern Historical Society, at the University of North Carolina, Chapel Hill, in the late 1940's. (J.A. pp.254-255). Specifically, this evidence consists of 21 letters and telegrams to and from Mrs. Annie J. Storm (General Law's granddaughter) and the Executive Directors of the Southern Historical Society. (J.A. pp. 748-773). In the correspondence, Mrs. Storm and the Society are considering and negotiating over whether and on what terms the papers should be loaned or sold to the Society. Inteerestingly, the papers are variously described as both confederate records and as state house documents. A key passage in a letter dated November 12, 1948 from Mrs. Storm to Mr. J.G. de Roulhac Hamilton describes the documents as "Original State House papers entrusted to my grandfather at the time of the surrender." (J.A. p. 767). Another letter, between Mrs. Storm and a representative of the State of South Carolina, Dr. R.L. Meriwether, describes the documents as being "entrusted to my grandfather, Maj. Gen. E.M. Law for safe keeping at the time Sherman entered Columbia." (J.A. p. 784). Accordingly, General Law did not accidentally end up with the papers, but instead was given them purposefully, and presumably by Governor Magrath, who certainly had the authority to do so.[2]

Close examination of the Storm/Chapel Hill correspondence led to the discovery of links between the Law family and the State of South Carolina in the late 1940's. This evidence consists of six letters by and between Miss Blanche C. Law, Mrs. Storm, and Dr. R.L. Meriweather concerning the collection of confederate documents which are at issue in this case. (J.A. pp. 782-

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[2]"Entrust" is defined as to give over to another something after a relation of confidence has been established; to deliver to another something in trust or to commit something to another with a certain confidence his care, use, or disposal of it. Black's Law Dictionary, Fifth Edition, 1979. Also, it has been defined as to surrender something to another with a certain confidence regarding the care, use, or disposal of it. Webster's New International Dictionary, Second Edition, 1957.

787). Dr. Meriwether was a State employee as the Secretary of the South Caroliniana Library, which is part of the University of South Carolina, a public university. Examination of the Meriwether correspondence leads to the inescapable conclusion that the State of South Carolina knew of the existence of the collection of confederate documents since 1948. Furthermore, in addition to the State's knowledge of the existence of this collection, and their ability to inspect and apparent actual inspection of these materials, the correspondence also shows that the State could have purchased and otherwise acquired the materials in the late 1940's.

Dr. Scott Poole, Respondent's expert witness, offered substantial insight into the historical treatment of records and archives by the State of South Carolina, and an historical overview of the time periods in question. In his written report and trial testimony, he pointed out that until the last 25 years, the State Archives was relatively inactive in securing the State's records. (J.A. pp. 103-110, 810). Historically, private individuals and organizations were of primary importance in preserving materials. In fact, until 1905, with the creation of the "Historical Commission of South Carolina" (the forerunner of the present Archives department), there were largely no efforts to preserve public records by the State. Dr. Poole also noted, as did the State's witnesses, that the documents at issue in this case were of military significance, and concerned, in large part, troop movements and dispositions, supplies, officer's reports, and like matters. It was therefore not unusual that a high ranking confederate officer would receive documents of military importance in a military emergency, and then keep them when it was clear that the South would not rise again. Finally, Dr. Poole testified that the microfilming of the documents is of primary importance to the historian and archivist (as opposed to access to the originals), as this is the easiest and safest method of handling and researching the materials. (J.A. pp. 334-336).

In conclusion, Governor Magrath (or other persons in appropriate authority) apparently trusted the Provost Marshal, General Law, with the documents. In a time of chaos and surrender, sensitive military and political documents were given to the appropriate person to have them in those times- a Confederate Major General. After the war, General Law, in apparent accordance with the expectations of the participants in the events, kept, preserved, sold, and ultimately passed the materials down to his descendants, and did not do so in secrecy. The General's family, through the workings of time and the various estate distributions, received the papers, and then passed them down to Mr. Willcox, who now owns them.

SUMMARY OF ARGUMENT

The Court of Appeals and the District Court correctly found that the State of South Carolina is not the owner of approximately 444 confederate era documents, pursuant to either an alleged Public Records doctrine or to the State Records Act, and in accordance with established common law precedent concerning ownership and possession of personal property in South Carolina. Furthermore, the Court of Appeals and the District Court committed no error in finding that these documents, even if they originated in the South Carolina Governor's office, are private in nature. Additionally, while the Court of Appeals did not find it necessary to address the issues, the District Court correctly found that the common law defense of staleness and the statute of limitations bar any claim of ownership of these documents by the State.

The Appellant also makes two new arguments in their Petition that are not preserved for review. These each appear to involve the Court of Appeals and the District Court not certifying questions of law to the South Carolina Supreme Court. The State argues that the *Erie* Doctrine has been violated by the Fourth Circuit, and the opinion also conflicts with decisions of other Courts of Appeal. Regardless of how the State has couches these issues, they

were not raised in the lower courts and properly preserved for review.

Even were the new issues preserved for review, the Court of Appeals and the District Court committed no error on these issues. Each Court exhaustively analyzed South Carolina case and statutory law from the relevant time frame, and found that the State had no viable ownership claim. Long established South Carolina common law holds that undisturbed possession of personal property, particularly for a lengthy period of time, is prima facie evidence of title and ownership. The presumption could not be rebutted by the State, as Governor's records in South Carolina were not and are not public property, nor was there any other evidence to support the State's claim of title. Accordingly, Respondent submits that a Writ of Certiorari should not be granted.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS DOES NOT VIOLATE *ERIE RR v. TOMPKINS*

The Appellant raises, for the first time in its Petition to this Court, that the Fourth Circuit Court of Appeals violated *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) in rendering its decision. The State argues that *Erie* was violated through a narrow or incorrect reading of state law, for failure to certify a question of law to the South Carolina Supreme Court, and through applying "general law" rather than state law. The Court of Appeals committed no error on these issues.

An *Erie* issue may not be raised on appeal for the first time in this Court. The State did not preserve the issue, if any, on appeal from the District Court opinion, which contained a similar analysis of controlling state law as the Fourth Circuit decision. The State also failed to raise the issue to the Circuit Court in its Petition for Rehearing and Petition for Rehearing En Banc. Accordingly, it is

inappropriate to now make this argument, as it could have been, and was not, presented to the lower Courts.

The State makes the novel argument that *Erie* is jurisdictional, and may therefore be raised at any time. This is wholly unsupported by case law, and there appears to be no authority that supports this unique proposition. *Erie* addresses the substantive law to be applied by the Federal Courts in deciding state law claims. Subject matter jurisdiction, whether based on diversity or bankruptcy, is a separate body of law. One need read no further than the *Erie* opinion to find guidance on this subject. "[F]ederal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the state, unwritten as well as written." *Erie* at 73. Of course, it has long been the rule that *Erie* applies to bankruptcy cases. *See, e.g. Marshall v. Marshall*, 547 U.S. 293 (2006), (Applying substantive Texas law in Bankruptcy Court proceedings). The various Federal Courts' jurisdiction in this matter has been admitted by the State on page 3 of their Petition for a Writ of Certiorari. Subject matter jurisdiction and substantive choice of law issues are separate and unconnected issues. *See, e.g., Markham v. City of Newport News*, 292 F.2d 711, 717 (4th Cir. 1961). Accordingly, any *Erie* based argument is not jurisdictional and cannot be made at this late date.

As for the merits of any *Erie* argument, the Appellant contends the Appeals Court's failure to certify a question or to abstain from hearing the case led to application of South Carolina law in an unduly narrow fashion, and to application of "general law", instead of South Carolina law. Review of the legal basis of the Fourth Circuit decision shows these contentions to be without merit.

The Fourth Circuit and the District Court correctly found that the State of South Carolina is not the owner of these civil war era documents, as it could not overcome the presumption of Respondent's ownership through possession. The State has asserted ownership pursuant to either an

alleged Public Records doctrine or under the State Records Act. Specifically, the State did not meet its burden of proving superior title to the documents as there is no statute or case establishing that Governor's Records were public records prior to 1865, and that the records are not the property of the State as they were never in the possession of the Secretary of State. Accordingly, the presumption of ownership by the possessor could not be overcome by the Appellant.

South Carolina law concerning ownership of personal property, and the effect of time and possession, has long been set. Under *Collins v. Bankhead*, 1 Strob. 25 (S.C. 1846), lapse of time gives rise to the presumption of ownership. Furthermore, it is the policy of the law to have personal property vested as early as practicable, and not to favor remote or stale claims, after a long lapse of time. Possession, of course, is always prima facie evidence of good title to personal property. *Ex Parte Dort*, 238 S.C. 506, 121 S.E.2d 1 (1961); *Elliott v. Wilson*, 181 S.C. 406, 187 S.E. 825 (1936). Ownership of personalty is presumed from possession. *Wheeler v. Wheeler*, 111 S.C. 87, 96 S.E. 714 (1918); *Thompson v. Chapman*, 107 S.C. 461, 93 S.E. 142 (1917).

The burden of proof in this matter is bourne by the State of South Carolina. As possession carries a presumption of ownership, the burden is placed on the non-possessing party to prove superior title and right to possession. *Hammond v. Halsey*, 287 S.C. 46, 336 S.E.2d 495 (S.C. App. 1985). Furthermore, under *Hammond* the party with the burden of proving superior title cannot challenge the sufficiency of evidence to establish possessor's title, but must recover on the strength of its own title.

The State does not, and cannot, seriously contest Appellant's title based on these common law principles. Instead, the State asserts that the documents are public records pursuant to Title 30 of the South Carolina Code of Laws, or the common law, and must be returned to the State.

The District Court correctly found that the State's claims are without legal merit, and the Bankruptcy Court erred in finding the documents to be the property of the State. The District Court did so by properly applying the De Novo standard of review as to the questions of law. The Fourth Circuit, agreeing with the analysis of the District Court, affirmed the District Court.

Any claim by the Appellant under the Public Records Act, S.C. Code Section 30-1-10, *et seq.*, fails as the Public Records Act does not appear to have been enacted until the 1950's, and the earliest codification appears to be in the 1962 Code of Laws. It is patently impossible for a statutory system to apply to matters of personal property law that occurred some 100 years before the enactment of the statutes.

If the State has a viable claim, it must rest on the common law as it existed in and prior to 1865. There is no South Carolina authority, modern or otherwise, to support a common law State Records doctrine. The elements of this purported theory are that the State has a right of possession to documents, unless the documents were abandoned or transferred by an act of the Legislature. Appellant, in the proceedings below, primarily relied on a North Carolina case in support of its common law position, namely *North Carolina v. West*, 235 S.E.2d 150 (N.C. 1977). No other state, at any time, has adopted the doctrine advanced in *West*.[3]

West does not apply to the facts of this case. Firstly, it concerns two "Bills of Indictment", which are Court records which at some point were unlawfully removed from North Carolina Superior Court records. Such records were required to be kept in North Carolina. However, there is no law, custom, or practice that required the keeping of the documents at issue in this case. While the argument below will address the nature of these documents as originating

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[3] No mention of the *West* case is made by the Appellant in their Petition for a Writ of Certiorari.

with the Governors of South Carolina, the historical record in South Carolina is devoid of substantial attempts to keep and maintain any State Government records until 1905, when the Historical Commission of South Carolina was created by the legislature. Dr. Poole, Appellant's expert witness, testified and submitted by way of his report that South Carolina, during the nineteenth century and before, simply had no interest in records preservation. To now find, retroactively, that there was a common law State Records doctrine is to ignore the history of how documents were treated and handled, and the private nature of collection and preservation efforts until the early 20th century.

What is particularly interesting is that there are clues in earlier South Carolina jurisprudence that a common law Public Records doctrine would not have been adopted if the issue were raised in the nineteenth century. In *Sternberger v. McSween,* 14 S.C. 325 (1880), the state Supreme Court discussed the ramifications of the removal of an agricultural lien from the records of the RMC Office. In that matter, an original record was filed, but the original lien itself was apparently given back to the lienor, instead of a copy. In the opinion, the Court stated that while it could not sanction the practice, neither could it condemn it. Of particular interest is the observation that "if private individuals are at liberty to remove [records] whenever they see fit, they necessarily lose their character as public records." *Sternberger* at 39. Accordingly, the entire framework of the analysis urged by the State, that Government records are somehow different than other types of documents and personal property, is not reflected in South Carolina case law. In the only case to address such matters, the state Supreme Court intimates that mere possession of a document can ripen into ownership, even of a Court or government record. Neither abandonment nor an overriding state ownership claim, in accordance with the alleged Public Records doctrine, is discussed by the Court. Accordingly, there is evidence, from the late 1800's, that South Carolina specifically did not have a Public

Records doctrine as a component of its common law at that time.

The State has also complained that the title of Respondent is defective as there is no chain of title, and the documents were merely entrusted to General Law. However, as set forth above, entrustment is defined as the surrender of property with a certain confidence concerning its care, use, or disposal. There is no indication that General Law could not dispose of the documents, or keep them, as he saw fit, and he always acted as if he were allowed to sell the documents if he wished. Under *Hammond*, the State's claim must stand or fall on its own merits. Doubts as to Appellant's ownership are no substitute for the lack of a viable claim by the State on its own merits. Under these circumstances, the presumption that the officer in question, namely the Governor or the some other official, did their duty must be assumed. *Sternberger* at 39. At this late date there is no evidence or cause to suspect the General Law did not properly come into ownership of the documents, and we must assume that was the legal, proper, and appropriate intention of the participants at that time.

The District Court and the Fourth Circuit correctly found that a common law Public Records exception and the State Records Act do not apply to the documents in this matter, and that records, papers, or documents originating in the Governor's office were private in nature. No statutory section in the State Records Act, nor any part or portion of the S.C. Code governing the State Archives, refers to Governor's or Executive Records. The definition of Public Record, found at S.C. Code Section 30-4-20(c), refers to the records of a public body. Reference to this definition, found at S.C. Code Section 30-4-20(a), shows that while it includes State agencies, it does not include the Governor's office. Accordingly, under the plain language of the act, these materials cannot be "Public Records," and the State has no claim to them under this theory.

The State relies on *West* to attempt to show that there is no Executive records exception to the Public Records doctrine. *West* is not controlling law for the following reasons. Firstly, the case does not concern Governor's records, but Court records. The Fourth Circuit and the District Court corrected the Bankruptcy Court's error in extending and applying the *West* decision far beyond the facts of that case.

Furthermore, *West* does not concern the collection and retention of documents that are private in origin. *West*, at 154. In this case, the evidence presented at trial clearly shows that Governor's records were and are private property. The State Archives has one out of seventy-two Governor's or executive records from the founding of the colony until 1866. Governor Magrath's records are at the South Carolina Historical Society in Charleston, a private institution. (J.A. p. 325). Portions of the records of Pickens and Bonham are at the Library of Congress. Perry's are in Alabama and North Carolina. Thurmond's, Hollings', and McNair's are, in whole or in part, where they wished them to be, and that is not at State Archives. To this day, the Executive is merely required to maintain records under S.C. Code Section 1-3-30; how the Governor disposes of such records is in his or her own discretion. No South Carolina authority, whether by code or common law, requires a Governor to turn over his records to any person or any state agency. In fact, the government of the State of South Carolina has always acted as if executive papers are private, and have only changed their position upon the filing of this case.[4]

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[4]Two Attorney's General opinions have some bearing on this matter. The first concerns a request by an officer at Shaw Air Force Base in 1959 for letters between the Governor of South Carolina and the Secretary of War concerning the base between the years 1942 and 1945. An Assistant Attorney General wrote the officer that "he was advised by the Director [of Archives] that Governors either took with them or, to some extent, destroyed their papers, and only one Governor, that is Governor Strom Thurmond, now a U.S. Senator, gave the papers for perpetuity . . . ."

This is not to say that Governors were not supposed to make some record of their acts and activities. Under the Constitution of 1790, Governors would send "messages" to the legislature, and attach relevant documents to such messages to keep the legislature informed of his doings and to make a permanent public record of those affairs. The South Carolina Constitution of 1790, Article II, Section 12. At trial, it was revealed that this was how a Governor, under the law and practice of early State government, made a public and permanent record. (J.A. pp.328, 428, 559-560). This practice changed only when the law changed after the Civil War. (See Act No. 4754, 1865). Even were the record keeping requirements enacted in late 1865 applicable to ownership issues, the law was not changed until after Pickens, Bonham, and Magrath left office.[5]

Obviously, the precedent that Governors owned and did what they wished with their papers in now being ignored by the present Agencies involved in this litigation. 1959 W.L. 10669 (S.C.A.G.).

The second opinion is a request from the Director of Archives in 1965 for guidance on a request by the State of Georgia for the return to that State of their Colonial Charter. In order for Archives to convey the Charter to Georgia, the Attorney General advised that the Charter could be lent to Georgia, "with the assurance that the General Assembly would subsequently be requested to authorize the gift of the document at its next session." Accordingly, the State of South Carolina has not itself acknowledged the ownership rights of other states as to "their" documents, and instead has sought to have a bill passed divesting itself of ownership. Certainly, in this past situation, this State did not advance a public records exception to traditional personal property ownership law. 1965 W.L. 11245 (S.C.A.G.).

[5] It may be that all or many of the documents at issue in this matter are already preserved at State Archives. At trial it was revealed that through the messaging process set forth in the 1790 Constitution, and through other record keeping, that copies of the documents may already be at State Archives. However, Archives wants these documents because they are better organized and easier to use and examine than the materials already at Archives, and because Archives has not organized its records and is not sure what is in their collections.

There are further indications that Governor's records are private in nature. In 1801 then Governor Drayton sent a message to the legislature urging them to pass legislation to require Governors to maintain records for their use and that of their successors. The legislature declined to act on this request. Furthermore, there was not even an archival agency until 1905. Even were the records kept, there would be nowhere to store them, and no one with the legal authority to hold them.

Finally, it appears that executive records, in general, have always been considered private property. Legal authority for this may be found as far back as *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) in which Justice Story found that the personal papers of George Washington remained the property of his family. More recently, these issues have come up in connection with the personal papers of Richard M. Nixon. See *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). Presidential papers remain the personal property of the President, subject to reasonable regulation because of their importance for matters of national interest and security. 43 Op. Atty. Gen. 11 (1974).

These principles have only been fully explored in the D.C. Circuit's opinion in the Nixon matter. In *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992), the Court addressed directly the claim of ownership of former President Nixon to his papers. The Court, after an exhaustive analysis of the then present possession, location, and ownership of each President's papers, found that Nixon indeed had a "compensable property interest" in his papers. The basis of this holding was the that a property interest was created through and reinforced by uniform custom and practice. In other words, history matters, as Presidents always have exercised dominion and control over their presidential papers. *Nixon* at 1277.

The essential error of the Bankruptcy Court in its Order, and the flaw the Circuit Court and District Court corrected, is that the Bankruptcy Court adopted a *West*

based framework of analysis, which ignores South Carolina law, history, practice and custom. The legal analysis employed by the District Court, and then by the Fourth Circuit, considered the acts of the people at the time, found the controlling South Carolina common law principles both in that history and in the South Carolina law of the period. It goes without saying that the lengthy record set forth above, as to the States and the former Governors treatment of executive department records, supports the finding of private ownership by the Respondent of these documents. Such an application of both the unwritten and written substantive law of the State of South Carolina is not an *Erie* violation- It is exactly the outcome that *Erie* was intended to foster.

II. THE COURT OF APPEALS CORRECTLY DETERMINED SOUTH CAROLINA STATE LAW

Appellant argues that this matter should be reviewed under *Leavitt v. United States*, 518 U.S. 37 (1996), as the Fourth Circuit decision is a "plainly wrong" determination of state law. As Appellant acknowledges, this Court does not ordinarily review decisions applying state law. Examination of Appellant's arguments reveals that this case does not involve issues subject to review under *Leavitt.*

A. The Court Of Appeals did not erroneously depart from the Findings of Fact of the Bankruptcy Court

Appellant alleges that the Fourth Circuit erred in making findings of fact contrary to the Order of the Bankruptcy Court, or in making its own findings of fact without finding any of the Bankruptcy Court's facts to be clearly erroneous. Appellant's contentions are simply incorrect. Each of the allegations of factual error by the Fourth Circuit is, in fact, supported by the Bankruptcy Court findings.

Appellant's first specific allegations of inappropriate fact finding is that the papers contents and their production

are not in dispute, and that the records have public and private aspects. (467 F.3d at 415, n.2). The State seems to say that because the documents were Governor's records, they are public records, and this ends any further legal analysis. However, the Fourth Circuit also states in the footnote that the papers were produced in an official context, but that whether or not they are gubernatorial papers begs the question. When consideration is given to the entire footnote, it is clear that the Bankruptcy Court's fact findings were not altered or amended. The Fourth Circuit fully considered these fact findings, and then properly looked to South Carolina law to determine the legal status of the papers. This is not improper fact finding; it is, instead, the Court of Appeals applying the correct law to the facts of the case to render a just decision.

The State also asserts that the Fourth Circuit improperly found as fact that there is no evidence that the papers, in the period of 1865 and before, would have been considered executive or gubernatorial records. However, the State does not point to any finding of fact by the Bankruptcy Court that was ignored or altered in the Fourth Circuit opinion. The Court of Appeals properly noted the State's lack of evidence at trial that these materials were considered to be public records in the relevant time frame. For the Fourth Circuit to point out a lack of evidence as to the State's claims is not improper fact finding.

The State further complains that it was error by the Fourth Circuit to observe that various Executive Branch records are in places such as Clemson University or the University of South Carolina. Of course, the record has examples of similar documents also being in private collections. These matters are noted in the Bankruptcy Court Order, but were given little weight by that Court. (App. a.69-70). While the Bankruptcy Court found that there were no private aspects to the documents, this was legal error by that Court founded on its flawed interpretation if South Carolina law. For the Appeals Court to point out undisputed

facts in the context of the appropriate legal analysis is not improper fact finding.

As a final factual matter, the State complains that the Appeals Court did not give conclusive weight to the "docketing" of the documents. Docketing is not a controlling, or even a particularly important, factor in determining ownership. Docketing is simply a method of organizing documents- nothing more and nothing less. What the documents are, who possessed them, and how they have been treated are much more important than how the documents were potentially filed and organized at one limited point in time.

B. There is no South Carolina Case Law that Supports the Proposition that Governor's Records are Public Records

Appellant cites a number of cases in support of the proposition that the records of Public Offices are Public Records. However, no case is cited by Appellant for the proposition that Governor's Records are Public Records.

In support of this position, Appellant cites *State v. Farnum*, 73 S.C. 165, 53 S.E. 83 (1905). This opinion is misconstrued by Appellants as controlling law. It does not address the ownership of executive records. Also, it was also handed down by the South Carolina Supreme Court some 40 years after the events in question.

The exact legal issue before the lower Courts, no matter how presented, comes down to this simple question: In 1865, what was the law in South Carolina concerning a Governor's ownership of documents? No statute, case, or other authority, in this or any other State, in 1865 or before, can be cited for the proposition that the State of South Carolina owns these documents. The pre- Civil War case cited by the Fourth Circuit, *Pinckney v. Henegan*, 33 S.C.L. 250, 2 Strob. 250 (S.C. App. L. 1848), stands for the proposition that records in the possession of the Secretary of State's are public records. When the *Pinckney* case is read in

conjunction with the 1865 Act, it is clear that for these records to be Public Records they would have to be deposited with the Secretary of State, at the very least. Accordingly, the Fourth Circuit correctly found that *Farnum* did not apply to the facts of this case.

C. There is no Statutory Authority that Governor's Records are Public Property

The State argues that there is statutory authority for the proposition that early Governor's Records are Public Property. However, there is no statute cited by Appellant for this proposition.

Appellant lists some eight statutes or constitutional provisions purporting to show that the documents at issue in this case are Public Records. Certain of these statutes refer to records of the legislature, and to property and probate records. Other provisions speak to the Governor's duties and responsibilities, but none of them say anything about who actually owns a Governor's documents. Not until late 1865 was the issue of Governor's records addressed by the legislature, in detailing the keeping of records and their deposit with the Secretary of State. See Act 4754, Statutes at Large of South Carolina, Vol. XIII, Statutes at Large (rep. Printing 1875). Of course, this law, even if construed to apply to this matter, was enacted after the documents were made and General Law came into possession of them. It also does not address the issue of ownership of such materials.

D. Respondent's Defenses Bar the State's Claims

Even were the State able to make viable claims to the documents in question, there are still a number of legal theories and defenses available to the Appellant to defeat such claims. These include abandonment, waiver, estoppel, laches, unconscionable and inequitable conduct, staleness, and statute of limitations. The District Court found that common law principles and defenses, such as staleness and

the statutes of limitation, barred any claim of ownership of these documents by the State. The Fourth Circuit, in analyzing the case, did not address the issue as the State could not overcome the presumption of ownership through possession.

Given the present posture of the case, it does not appear that these issues will be before this Court, although they could potentially arise if there were a remand to the lower Courts for further proceedings. Nevertheless, the decision of the District Court applying these defenses to defeat the State's claim of ownership was correct. If necessary, Respondent will argue this position in future proceedings; however, Respondent's defenses do not appear to be issues in the case at this time.

III. THE COURT OF APPEALS' REFUSAL TO CERTIFY STATE LAW QUESTIONS DOES NOT CONFLICT WITH DECISIONS OF THE UNITED STATES SUPREME COURT AND OTHER COURTS OF APPEAL

This issue is similar to the Appellant's *Erie* issue, and like that issue, it has not been preserved for review. Specifically, it was not raised as an issue on appeal in the lower courts. Furthermore, there is no conflict amongst the Circuits, as asserted by the Appellant.

The Bankruptcy Court, in its Order, denied the State's request for certification of questions of law to the South Carolina Supreme Court. The Appellant did not appeal this ruling to the District Court, and did not make a Motion for Certification under Rule 8011 of the Bankruptcy Rules of Procedure. The State chose not to file such a Motion, which was the proper vehicle for raising the issue. Instead, the State, in a footnote in their Brief, stated that they reserved their rights to make such a Motion in the event the Bankruptcy Court Order was not affirmed. (District Court Brief of Appellees, p. 28, n.17). Nevertheless, after the District Court decision, no such Motion was made.

The certification issue was not raised by the State on appeal to the Fourth Circuit. In their Brief to that Court, they stated that certification was an option if that Court wanted guidance from the South Carolina Supreme Court. (Fourth Circuit Brief of Appellants, p. 37, n. 9). A Motion, pursuant to Federal Rule of Appellate Procedure 27, was not filed by Appellant to request certification.

After the issuance of the Fourth Circuit opinion, the State's Petition for Rehearing and Rehearing En Banc requested certification. The Petition was denied by the Appeals Court, and the proceedings in this Court then commenced.

The Fourth Circuit properly denied the certification request by the State. It was not an issue on appeal, and the request was simply made too late–The Fourth Circuit had issued its opinion, and there was no question then left to certify. Furthermore, as Chief Justice Roberts (sitting as Circuit Justice) has already noted in the Opinion On Application For Stay, the Appellant's certification issue was only mentioned "in passing in the court below." *Stroup v. Willcox*, 549 U.S. ___ (2006). Chief Justice Roberts further noted that Appellant requested that the Fourth Circuit rule on the merits of the matter. (Fourth Circuit Brief of Appellants, p. 47). A similar request for a ruling on the merits was made by the State in the District Court. (District Court Brief of Appellees, p. 28).

Based on the forgoing, Respondent submits that this issue is without merit. The State requested from the District Court, and then from the Fourth Circuit, a ruling on the merits of the case. It elected not to file a Motion to Certify Questions of Law in either Court, and then, after the issuance of the Fourth Circuit ruling on the merits it had requested, finally asked for certification. Accordingly, this issue has not been preserved for review.

The State also argues that the failure to certify by the Fourth Circuit raises conflicts in principles of federalism

between the Circuits. This contention is without merit. There is no decision on certification by the Fourth Circuit from which the State may appeal. As a Motion to Certify was not made by the State, there is no decision to compare with the rulings of other Circuits. While the State's Petition for Rehearing and Rehearing En Banc included the issue, it was then outside the scope of Rules 35 and 40, Federal Rules of Appellate Procedure. To be succinct, certification was not an issue overlooked by the Fourth Circuit, because it was never raised on the appeal.

The State correctly notes in its Petition to this Court that certification is within the sound discretion of a federal court. *Lehman Bros. v. Schein*, 416 U.S. 386 (1974). Given the State's failure to actively raise and pursue the issue through two appellate levels, it is not an abuse of the Fourth Circuit's discretion to decline certification after the issuance of an opinion on the merits. Nor does the State argue that the Circuit Court's failure to certify is plain error. Accordingly, this issue is without merit.

CONCLUSION

For the foregoing reasons, Respondent Thomas Law Willcox requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

/s/

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No. 06-1158

In the Supreme Court of the United States

RODGER STROUP, Director, South Carolina Department of Archives and History; STATE OF SOUTH CAROLINA, ex rel Henry McMaster, Attorney General for the State of South Carolina ,

Petitioners,

v.

THOMAS LAW WILLCOX, JOHN M. WILLCOX and KATHRYN WILLCOX PATTERSON,

Respondents

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. *ERIE* IS A JURISDICTIONAL RULE AND THE COURT OF APPEALS VIOLATED THAT DECISION

The State of South Carolina (State)[1] asserts that the failure of the Court of Appeals to apply State law under *Erie RR. v. Tompkins*, 304 U.S. 64 (1938) was, itself, a jurisdictional failure.[2] As stated in *Markham*, *supra*, note 2, "*Erie* requires that the federal court grant or withhold relief as the state courts would." 292 F. 2d at 718. *Erie* imposed such restrictions as limitations on the Article III power of the Federal Courts as discussed in the Petition herein. (*See* Petition p. 9, n. 7).

Numerous decisions recognize *Erie* as a limit on the power of federal courts. "*Erie* . . .expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts." (emphasis added). *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 109 (1945). "Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 312 (1981); *see also*, *US v. Little Lake Misere Land Co.*, 412 U.S. 580,591 (1973) ("This principle follows from *Erie* itself where, although the federal courts had jurisdiction over diversity cases, we held that the federal courts

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[1] All references herein to State include Petitioner Rodger Stroup as well as the State of South Carolina.

[2] The State did not argue the unrelated issue that *Erie* should be applied to the determination of jurisdictional issues which appears to be the point addressed by *Markham v. City of Newport News*, 292 F. 2d 711, 717 (4th Cirt. 1961), which Willcox cites.

did not possess the power to develop a concomitant body of general federal law."); *City of Milwaukee v. States of Illinois and Michigan*, 451 U.S. 304, 334 (1981)[3]; *Twist v. Prairie Oil and Gas Co.*, 274 U.S 684, 691 (1927).[4]

Such lack of Article III power is a limitation on the power of the Federal Courts, and therefore, is a jurisdictional issue that can be raised at any time. See, Petition, p. 9, n. 7. The Court of Appeals exceeded its power by applying general law rather than State law and in doing so, transgressed its jurisdictional limits. Such an issue can be raised now, but it was also subsumed in the State's earlier arguments regarding the application of State law and certification.

Willcox fails to demonstrate that the Court of Appeals complied with *Erie*. Ironically, Willcox attempts to defend the decision of the Court of Appeals on the merits using primarily decisions from North Carolina,[5] Massachusetts[6], and a federal

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[3] " *Erie* made clear that federal courts, as courts of limited jurisdiction, lack general power to formulate and impose their own rules of decision." *City of Milwaukee*, *supra*, (Marshall, dissenting)

[4] "Such waiver is possible, because the objection that the bill does not make a case within the equity jurisdiction of a federal court goes not to the power of the court as a federal court, but to the merits." *Twist* , *supra*

[5] *North Carolina v. West*, 235 S.E. 2d 150 (N.C. 1977).

[6] *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841), Involved only private individuals, one of whom had a copyright to certain of George Washington`s papers. The interest of the federal government in those papers was not adjudicated. The Court concluded the case on the basis of the copyright.

court[7]. This reliance on the authority of other jurisdictions underscores the *Erie* violation in this case and the failure of the Court of Appeals to apply South Carolina law.[8]

Willcox erroneously contends that the Bankruptcy Court relied on a *North Carolina v. West, supra,* "framework of analysis." That case was certainly not the principal authority on which the Bankruptcy Court based its decision. Petition, p. a70. That Court relied primarily on South Carolina authority and discussed *West* only as to the point that the State cannot be

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[7] *Nixon v. United States*, 978 F. 2d 1269 (D.C. Cir, 1992) addressed the question of the ownership of Presidential papers. This decision was based upon three factors not present in the instant case, the absence of a common law rule, a "robust tradition" of private ownership, and explicit legislative recognition. Willcox' arguments about the retention of records of other Governors, which is oddly placed in his *Erie* argument, is addressed *infra* in Argument II.

[8] Willcox does discuss South Carolina law regarding presumption of ownership from possession, but that authority does not address the ultimate question of whether the Documents at issue are public property under State law.

Willcox also addresses the State Records Act that was passed long after the Documents in question were created. S.C. Code Ann. §30-1-10, *et seq.* (1991 and Supp. 2006). The State did not argue in its Petition that the Act directly applies to the Documents in question, but the State did emphasize that the Act represented a codification of existing South Carolina policy. That Act clearly applies to the Governor's papers because they are ". . . prepared, owned, used in the possession of or retained by a public body. . . ." §§30-1-10(A) & 30-4-20 (c) (Supp. 2005).

divested of its property absent legislation.[9] *West* was mentioned in the State's District Court brief only in response to Willcox' arguments about the case and was mentioned only late in the State's Court of Appeals briefs as to the divestiture argument.

The one South Carolina case that Willcox discusses was not one on which the State or the Bankruptcy Court relied. *Sternberger v. McSween*, 14 S.C. 35 (1880). Willcox completely misreads *Sternberger* to assert that " . . . the state Supreme Court intimates that mere possession can ripen into ownership, even of a government record." *Sternberger* recognized that records on file are public records. That case did not hold that a removed record is non-public, but simply noted rhetorically that public records would lose their character if they were removable at will. The case did not hold that public records were removable. Rather than support Willcox's position, *Sternberger* supports the State.

In connection with the *Erie* argument, Appellant fails to discuss any of the South Carolina case law and statutes[10] on

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[9] Willcox cites *Ops. Atty. Gen* (July 23, 1965), 1965 W.L. 11245, (J.A. p. 183) which held that State agencies lack authority to make a gift to another state of historic records pertaining to that state absent legislative authorization. Archives witness McCawley testified that the reason that South Carolina had a copy of Georgia charter referenced in the 1965 Opinion was that the text of the document had been recorded in a South Carolina record book. J.A. p. 453, l. 9 - p. 454, l. 18. It was, therefore, a South Carolina, not a Georgia document.

[10] As noted *supra*, note 7, Willcox makes factual arguments about the disposition of the records of former Governors which conflict with the Bankruptcy Court's findings and are discussed infra in Argument II. These factual arguments have nothing to do with the *Erie* violation in this case.

which the Bankruptcy Court relied as to the key issue of whether the Documents in question are public records. Willcox relies on authority from other jurisdiction just as that Court did. In doing so, Willcox demonstrates the *Erie* violation in this case rather than overcomes it.

II. THE COURT OF APPEALS DETERMINATION OF SOUTH CAROLINA STATE LAW ISSUES IS PLAINLY WRONG

A. Fact Findings

Willcox argues that the Court of Appeals did not depart from the Fact findings of the Bankruptcy Court, but it clearly did so. Contrary to his assertions, the State has identified several key departures from the Bankruptcy Court's findings by the Court of Appeals. In particular, although the Court of Appeals recognized that the Documents were produced in an official context (Petition, p. a14, n. 2), its decision conflicted with the Bankruptcy Court's findings as to docketing. The Bankruptcy Court specifically found that the " . . . docketing system [for the Documents] appears to indicate an intent to preserve the document as relating to the public office." Petition, p. a61." This finding was more than a finding of the production of the Documents in an official context. It was a finding as to the intent of the State regarding the disposition of the Document. Moreover, the Court of Appeals ignored the following overriding finding of the Bankruptcy Court: "In sum, the Documents as a whole appear to relate to the official duties of the public office of the Governor and for the reasons stated herein appear to be public records." 329 B.R. at 568 (App.

a62). [11]

Although Willcox's argument concerning the disposition of the papers of some South Carolina Governors has no bearing on his *Erie* argument, he placed it in that section of his brief and gave brief mention to it in connection with his argument as to the plainly wrong Court of Appeals decision. His argument that Governors papers are considered private, and the related findings of the Court of Appeals directly conflicts with the following finding of the Bankruptcy Court: ". . .[I]t appears that the State has been active in preservation of its records. . . . Plaintiff did not present convincing evidence to support its conclusion that Governor's records involving public functions are considered private and that they are generally kept by each Governor to do with what they wish." [footnote omitted]. 329 B.R. at 572 (Petition, p. a69). Moreover, most of the documents of former Governors that are at other institutions are accessible to the public as noted in the Petition.[12]

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[11] The Court of Appeals also failed to follow this finding of the Bankruptcy Court: "The fact that many of the official duties of the Governor, a public official, are specifically addressed by the referenced Documents, lends strong support to the State's position that the Documents are public records. [footnote omitted]." 329 B.R. 567 (App. a59). *See* also *infra*, as to the the records of other Governors.

[12] Willcox references a December 9, 1959 letter from the Attorney General's Office regarding records of 1940's Governors. Westlaw database at 1959 WL 10669. J.A. p. 328, l. 18 - p 330, l. 5. Archives actually has the records of the Governors of South Carolina during the period 1942 to 1945 referenced in the 1959 letter. J.A. p. 455, l. 9 - p. 456, l. 16. The Opinion made clear that Archives, at that time, had not been able to check all of its files for the documents due to its preparation for a move. *Id.* Obviously, those records were later found.

Willcox's Brief , including his Statement of the Case, contains a number of factual errors and speculation about the history of the Documents. These errors include speculation about how General Law might have acquired and passed on the Documents,[13] the family's care for the Documents and Law's attempts to sell or otherwise dispose of the Documents, [14]

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[13] The Court of Appeals found "t]here is no evidence of how General Law acquired the papers." Petition, p. a10. Willcox's statement that the State's witnesses admitted that General Law might have been given the Documents by legislative Act or the Governor's express direction are unsupported by the references he makes to the Record. The Bankruptcy Court found that the purpose of moving large numbers of State records out of Columbia was "presumably to prevent their destruction." Petition, p. a44. Contrary to assertions in Willcox's Brief, the Bankruptcy Court found that a large number of State archives and records were stored in location in Chester and elsewhere. Petition, p. a44.

Willcox contends that the Documents in question were given to his Great Aunt and passed from her to his father. These contentions are speculative and appear to be unsupported by the Record. *See*, Petition, p. a10.

[14] Willcox contends that his family has preserved, protected and organized the documents for approximately 140 years. This statement is inaccurate. As Willcox recognizes, he found the Documents in a bag in his deceased stepmother's closet after her home had been cleared of other property.

His speculation that General Law's sale of the Documents was in accordance with expectations of "the participants" in historic events, also conflicts with the statement of General Law's granddaughter Annie Storm over eighty years later that the Documents were entrusted to him for safekeeping and should be returned to South Carolina. J.A. pp. 764, 767, 770, 771, 784 and 785.

correspondence of General Laws' granddaughter[15] and irrelevant discussion of certain matters regarding the restraining order issued as to the auction of the Documents in 2004.[16] Willcox contends that "General Law acted at all times as the rightful and lawful owner of the papers," but this statement conflicts with the Court of Appeals' recognition that "[t]here is no evidence of how General Law acquired the papers" and that the papers "surfaced" only one time during General Law's apparent possession of them. Petition, p. a10.

B. Cases and Statutes

Willcox only briefly mentions *State v. Farnum*, 73 S.C. 165, 53 S.E. 83,85 (1905) and other State cases and statutes that are determinative in this case and very clearly support the Bankruptcy Court's determination that the Documents are public records and the property of the State of South Carolina.

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[15] Willcox' refers to Dr. Meriwether, whom Ms. Storm wrote, as a representative of the State of South Carolina, but the Bankruptcy Court found that the communications did not place on notice the Historical Commission, the predecessor to the Department of Archives, and the agency with the responsibility to collect historical documents. 329 B.R. at 574-575. (App. a75-a76). Therefore, Mr. Meriwether was not a representative of the State as to the matters in question.

[16] Willcox also references conversations with Petitioner Stroup at the time of the auction, but does not note Dr. Stroup's recollection that, because his staff was looking at the Documents at that time, he ". . . [did not] know if we have a claim for these documents." J.A. p. 572, ll. 1-5.; *see also* p. 527, l. 22 - p. 529, l. 241. The statements of the effect of the injunction on Willcox' privacy do not appear to be supported by the Record. Moreover, these issues are not relevant to the issue of the ownership of the Documents.

That authority is discussed at length in the State's Petition. pp. 20- 25. The Fourth Circuit's failure to apply that State authority or its reading it exceedingly narrowly was plainly wrong and nullified State law contrary to the authority of this Court. *Leavitt v. United States*, 518 U.S. 137, 144 (1996).

III. THE FAILURE TO CERTIFY STATE LAW QUESTIONS TO THE STATE SUPREME COURT CONFLICTS WITH THE DECISION OF THE UNITED STATES SUPREME COURT AND OTHER COURTS OF APPEALS

Willcox's brief discussion of this issue primarily focuses on what he contends was a failure to preserve the issue. As discussed in the State's Petition, the State preserved the certification issue at every stage of the proceedings.

Willcox contends that no conflict in the circuits exists on certification because the Fourth Circuit Court of Appeals made no decision regarding the issue. The State raised the issue of certification in its brief and in its petition for rehearing. Although the Court of Appeals did not write about the issue, it did make a decision not to certify. While the State recognizes that a Court has discretion as to whether to certify (*Lehman Bros. v. Schein*, 416 U.S. 386, 391(1974)), the Supreme Court has vacated decisions of Courts of Appeals so that certification could be considered. *Lehman Bros.*; *Arizonans for Official English v. Arizona*, 520 U.S. 43, 78 (2002). In failing to certify, the Court of Appeals departed from basic principles of federalism and the precedent of other Circuits and the United States Supreme Court. "The final arbiter of state law is the state supreme court" (*Blue Cross Blue Shield of Alabama v. Nielsen*, 116 F3d 1406, 1412 (11th Cir. 1997), but the Fourth Circuit made itself the final arbiter of State law in this case and wrongly decided and nullified State law in the process.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted to review the Opinion of the Court of Appeals.

Respectfully submitted,

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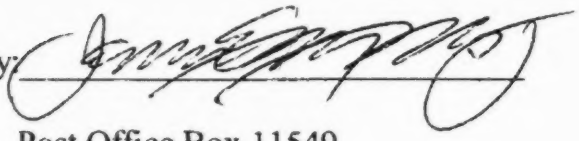
By: 

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